DOCUMENT RESUME

ED 253 926	EA 017 500

AUTHOR	Piele, Philip K., Ed.
TITLE	The Yearbook of School Law, 1984.
INSTITUTION	National Organization on Legal Problems of Education, Topeka, Kans.
PUB DATE	85
NOTE	348p.; For individual chapters, see EA 017 501-508.
AVAILABLE FROM	Publication Sales, National Organization on Legal Problems of Education, Southwest Plaza, Suite 223, 3601 S.W. 29th, Topeka, KS 66614 ($25.95 plus $1.50 postage and handling, prepaid).
PUB TYPE	Information Analyses (070) -- Books (010) -- Reports - Descriptive (141)
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	Board of Education Role; Collective Bargaining; *Court Litigation; Disabilities; Educational Facilities; Elementary Secondary Education; Federal Courts; Financial Support; Governance; Government School Relationship; Higher Education; *Legal Responsibility; School Districts; *School Law; School Personnel; State Courts; Student Rights; Teacher Rights; Torts; Yearbooks
IDENTIFIERS	Negligence

ABSTRACT

Decisions made by federal and state courts during 1983 concerning education are reported in this compilation of eight independently authored chapters. The first chapter focuses on governance, examining the organizational and authority relationships among state and local boards of education and the general public. The chapter on employees considers litigation affecting the employment, dismissal, and tenuring of public employees, including issues of discrimination and civil rights. Cases dealing with collective bargaining, the third major topic, raised questions about the scope of bargaining, grievances, job actions, and some constitutional issues, but broke little new ground. The fourth chapter, on pupils, looks at student rights, procedures for accommodating handicapped students, and new trends in discrimination cases. Claims of negligence account for the bulk of the litigation reported in the chapter on torts. Public support of private education, challenges to state aid programs, and problems surrounding school taxes prompted litigation reported in the section on finance. The discussion of property-related cases touches on the authority to use school property and the relations between school districts and outside agents building or maintaining school property. The eighth chapter concentrates on the rights of students and faculty members in institutions of higher education. (PGD)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED253926

THE YEARBOOK OF SCHOOL LAW

1984

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

- Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

T. Jones

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

Edited by

PHILIP K. PIELE

UNIVERSITY OF OREGON

EA 017 500

NATIONAL ORGANIZATION ON
LEGAL PROBLEMS OF EDUCATION
TOPEKA, KANSAS

Copyright © 1985

by

NATIONAL ORGANIZATION ON
LEGAL PROBLEMS OF EDUCATION

All Rights Reserved

Library of Congress Catalog Card Number: 52-2403

PRINTED IN U.S.A.

CONTENTS

FOREWORD / vi

PREFACE / vii

CONTRIBUTORS / ix

1 GOVERNANCE

Thomas N. Jones

1.0 Introduction / 1
1.1 State Boards of Education and Other Governmental Agencies / 2
1.2 Powers and Duties of School Boards / 4
1.3 The Public's Right to Know: Open Meeting Laws / 7
1.4 School Boards and Conflicts of Interest / 9
1.5 School District and Board Members Elections, Appointment, and Recall / 10
1.6 School District Organization / 13
1.7 School Boards and the Transportation of Students / 15

2 EMPLOYEES

Joseph C. Beckham

2.0 Introduction / 19
2.1 Discrimination in Employment / 19
2.2 Substantive Constitutional Rights / 24
2.3 Procedural Due Process / 28
2.4 Dismissal and Discipline / 33
2.5 Reduction-in-Force and Abolition of Position / 41
2.6 Contractual Disputes / 46
2.7 Tenure / 49
2.8 Certification / 52

3 BARGAINING

Delbert K. Clear

3.0 Introduction / 55
3.1 Constitutional Issues / 55
3.2 Authority to Bargain / 61
3.3 Recognition of Unions and Representation Problems / 63

3.4 Rights and Obligations of Exclusive Bargaining Representatives / 65
3.5 Scope of Bargaining / 72
3.6 Grievabilty and Arbitrability / 83
3.7 Judicial Review of Awards / 100
3.8 Impasse and Dispute Resolution / 105
3.9 Concerted Activity / 107
3.10 Miscellaneous Decisions / 110
3.11 Conclusion / 112

4 PUPILS

Henry S. Lufler, Jr.

4.0 Introduction / 115
4.1 Handicapped and Exceptional Children / 115
4.2 Public School Assignment, Tuition, and Transportation / 134
4.3 Bilingual-Bicultural Programs / 141
4.4 Private and Parochial Schools / 142
4.5 School Sports / 145
4.6 Substantive Rights of Students / 149
4.7 Sanctions for Student Misconduct / 163
4.8 Testing and Placement / 165
4.9 Desegregation / 167

5 TORTS

Paul W. Thurston

5.0 Introduction / 179
5.1 Negligence / 180
5.2 Negligence Defenses / 188
5.3 Liability Insurance / 196
5.4 Employee Injuries/Workers' Compensation / 197
5.5 Assault and Battery / 200
5.6 Defamation / 201
5.7 Tortious Interference with a Contract / 203
5.8 Products Liability / 204
5.9 Invasion of Right to Privacy / 205
5.10 Constitutional Torts / 206

6 FINANCE

Richard A. Rossmiller

6.0 Introduction / 212
6.1 Public Funds for Private Schools / 212

6.2 Sources and Allocation of Public School Funds / 217
6.3 School Tax Issues / 229

7 PROPERTY

Steven M. Goldblatt

7.0 Introduction / 243
7.1 General School Board Authority over Property Matters / 243
7.2 Attachment and Detachment of Land / 246
7.3 School Bond Referenda / 248
7.4 Zoning and Development / 249
7.5 Building Design and Construction / 251
7.6 School Closures / 258
7.7 Property Taxes / 261
7.8 Personal Injury / 264
7.9 Trespass / 268
7.10 Landlord/Tenant / 268
7.11 Higher Education / 268

8 HIGHER EDUCATION

Robert M. Hendrickson with Dennis E. Gregory

8.0 Introduction / 279
8.1 Intergovernmental Relations / 279
8.2 Employees / 281
8.3 Students / 303
8.4 Liability / 315
8.5 Antitrust / 316

TABLE OF CASES / 319

INDEX / 333

ABOUT THE EDITOR / 338

FOREWORD

Philip K. Piele has resigned as editor of the *Yearbook of School Law* after ten years of loyal and productive service. NOLPE owes Piele a great debt, and his active participation in the *Yearbook* will be greatly missed.

PREFACE

Published by the National Organization on Legal Problems of Education since 1972, *The Yearbook of School Law* provides unambiguous, bias-free summaries of state appellate and federal trial and appellate court cases affecting the operation, management, and governance of public elementary and secondary schools and postsecondary institutions in the United States. The 1984 *Yearbook* includes all cases relevant to public schools decided during the 1983 calendar year and reported (through the December 1983 advance sheets) in West's Regional, Federal, and Supreme Court Reports. Cases decided in 1982, but either overlooked or not reported in time for the 1983 *Yearbook*, are also included. Only important or substantively illustrative higher education cases reported in West's Reports in 1983 are included in the 1984 *Yearbook*.

Some 950 new cases are summarized in the 1984 *Yearbook*, a nearly 10 percent increase over the previous year. Much of the increase occurred in two chapters—property and higher education—nearly doubling the number of cases summarized in the 1983 *Yearbook*. With respect to the property chapter, however, the increase was not due to any sudden upsurge in litigation, but rather the result of successful efforts by the author to cast a wider net in his coverage of school property cases.

Despite the significant increase in property and higher education cases, legal issues involving public school student and teacher rights, including those related to collective bargaining, continue to dominate the contents of the *Yearbook*, generating well over 60 percent of the school law cases decided in 1983. Particularly prominent were issues involving the First Amendment religious rights of students, the educational rights of handicapped students, and the procedural due process rights of teachers, all of which produced a substantial amount of litigation in 1983. So too did the Sisyphean struggle for employment decisionmaking dominance between school boards and teacher unions.

This is the last *Yearbook* I will edit. Ten years is long enough, even if it has been a labor of love. I should like, therefore, to recognize all of those without whose contributions large and small the *Yearbook* would not have been—love or no.

I wish to thank the following school law scholars and writers who authored or coauthored a chapter for the *Yearbook* during the last ten years: Robert Bartman, Missouri Department of Elementary and Secondary Education; Joseph Beckham, Florida State University; Delbert Clear, The University of Wisconsin-Milwaukee; Everette DeVaughn, Georgia State University; Anne Dellinger, The University of North Carolina at Chapel Hill; Floyd Delon, University of Missouri-Columbia; James Forsberg, University of Oregon; Donald Gehring, University of Louisville; Steven Goldblatt, University of Washington; Steven Goldschmidt, University of Oregon; Robert Hendrickson, University of Virginia and The Pennsylvania State University; H. C. Hudgins, Temple University; Hugh Jascourt, Public Employment Relations Institute, Washington, D.C.; Margaret Johnson, University of Oregon; Thomas Jones, NOLPE; Betsy Levin, Duke University; Henry Lufler, Jr., The University of Wisconsin-Madison; Martha McCarthy, Indiana University; Marion McGhehey, NOLPE; Cheryl McMurry, University of South Carolina; Donald Moran, Kansas Association of School Boards; Virginia Davis Nordin, The University of Wisconsin-Madison; Alice Potter, University of South Carolina; Kenneth Richstad, University of South Carolina; Daniel and Richard Rossmiller, The University of Wisconsin-Madison; Paul Thurston, University of Illinois at Urbana-Champaign; Donald Wedlock, University of South Carolina; and Parker Young, University of Georgia.

With rare exception, these 29 people exhibited extraordinary analytical and writing skill in preparing their chapters and were extremely conscientious about meeting the submission deadlines. It was a privilege to know and work with all of them.

Several members of the ERIC staff helped me with the *Yearbook* over the years. Sandy Anders, Donna Atto, Mary Cote, Greg May, Carol Pritchett, Samantha McAlister and Jennilu Whitewell contributed to the proofing, case citation checking, and typing chores. Stuart Smith did a superb job of editing some of the property chapters I wrote. To Ellen Rice, who assisted me with much of the copy editing of the *Yearbook* and who prepared the index from 1975 to 1978, I am especially grateful for her truly exceptional attention to detail and deep concern for clarity in legal writing.

I should also like to acknowledge the useful contributions of the following members of the NOLPE staff: Janice Graham, Karen Hesse, Mary Luna, and Dee Slauson. In addition, I wish to thank Sue Tillett Jacobson who coordinated the production of the 1975 and 1976 *Yearbooks*, and Carol Sader who did an excellent job of preparing the index for *Yearbook* from 1979 to 1984. I especially want to recognize the dedicated and hard working efforts of Darel Semler who has had responsibility for coordinating the production of the *Yearbook* since 1977.

Finally, I should like to end with a quotation by Gerald Gross from the introduction to his book *Editors on Editing*, which expresses perfectly my feelings about being editor of the *Yearbook* these last ten years: "I loved it [editing] from the beginning and love it . . . now after . . . [ten] years full of joys, grief, achievements and frustrations."

Philip K. Piele, Editor

CONTRIBUTORS

JOSEPH C. BECKHAM
Associate Professor of Education
Department of Higher Education
Florida State University

DELBERT K. CLEAR
Professor of Education
Department of Administrative Leadership
The University of Wisconsin-Milwaukee

STEVEN M. GOLDBLATT
Associate Professor and Chair
Department of Building Construction
University of Washington

ROBERT M. HENDRICKSON
Associate Professor of Education
Higher Education Program
The Pennsylvania State University

THOMAS N. JONES
Executive Director
National Organization on Legal Problems of Education

HENRY S. LUFLER, JR.
Assistant Dean
School of Education
University of Wisconsin-Madison

RICHARD A. ROSSMILLER
Professor and Chair
Department of Educational Administration
University of Wisconsin-Madison

PAUL W. THURSTON
Associate Professor of Education
Department of Administration, Higher, and Continuing Education
University of Illinois at Urbana-Champaign

1

GOVERNANCE

Thomas N. Jones

Introduction 1.0
State Boards of Education and Other Governmental Agencies 1.1
Powers and Duties of School Boards 1.2
  General Powers 1.2a
  Authority to Provide Instruction 1.2b
  Power to Contract 1.2c
The Public's Right to Know: Open Meeting Laws 1.3
  Meetings 1.3a
  Notice of Meetings 1.3b
  Taping Meetings of the Board 1.3c
School Boards and Conflicts of Interest 1.4
School District and Board Members Elections, Appointment, and Recall 1.5
  Voting Irregularities 1.5a
  Election Contests 1.5b
  Recall of Board Members 1.5c
  Method of Selection of Board Members 1.5d
  Disqualification of Candidates 1.5e
School District Organization 1.6
School Boards and the Transportation of Students 1.7
  Bus Contracts 1.7a
  Bids 1.7b
  Duty to Provide Transportation 1.7c

1.0 INTRODUCTION

School board members, school administrators, and educators must understand their respective legal duties and responsibilities in the public school setting. This chapter will address court cases handed down during 1983 concerning school board governance. Specifically, topics that will be covered include the powers of school boards, open meeting laws, school board elections, school district organization, and school transportation issues.

1.1 STATE BOARDS OF EDUCATION AND OTHER GOVERNMENTAL AGENCIES

A recent Louisiana case confronted the question of the State Board of Elementary and Secondary Education's power to determine required courses of study.[1] The legislature passed a law requiring that balanced treatment of creation-science and evolution-science be given whenever course content dealt with the topic of origins. The state board argued that the law violated the state constitution because it usurped the board's power to set educational policy. The district court agreed, finding that the power to determine educational policy was vested in the board rather than the legislature. The Fifth Circuit referred the interpretation of the state constitution to the Louisiana Supreme Court.

The supreme court reviewed the history of the State Board of Elementary and Secondary Education. The board's predecessor under an earlier constitution had little authority. Under the present constitution the board was given the power to supervise and control public education and was given budgetary responsibility, but both grants of power were "as provided by Law." The court held that this referred to legislative acts. The board's power to determine educational policy was held to be limited, subject to the direction of the legislature. This relationship between the state board and the legislature was reinforced by another provision of the state constitution, which declared that the legislature was to provide for a public educational system.

The Ohio appeals court has considered the question of whether a school district can appeal to the courts a decision by the state board of education to assign it to a joint vocational school district.[2] The court ruled that since the proceedings held to determine whether the local school district should be assigned had provided for notice, an opportunity to present evidence, and the exercise of discretion by the state board, the proceedings were quasi-judicial in nature. As a result, the decision was appealable to the district court.

The North Dakota Supreme Court recently evaluated the dissolution and reorganization of a local school district.[3] The district had not operated a school for several years. The few resident school-age children attended in two other districts. The state board of education approved a county committee plan to divide the land involved between the two districts, and to apportion the dissolved district's assets and liabilities in the same proportions as the land transferred.

---

[1] Aguillard v. Treen, 440 So. 2d 704 (La. 1983).

[2] *In re* New Reigel Local School Dist., 456 N.E.2d 1245 (Ohio Ct. App. 1982).

[3] Garner Pub. School Dist. No. 10 v. Golden Valley Cty. Comm., 334 N.W.2d 665 (N.D. 1983).

The school district receiving less land and assets protested because there had been no opportunity to present evidence regarding the distribution of assets and liabilities. Since the state board is an administrative agency, the North Dakota court ruled that the board had to hold a hearing on this issue before a decision could be made.

Residents of a community outside the New York City School District tried to block the transfer of a residential drug treatment program out of the city and into local facilities previously used as a seminary and bible school.[4] The New York City Board of Education ran the program in a public school annex. The community argued that the commissioner of education failed to file an environmental impact statement and failed to consider factors statutorily mandated when a school district constructs new facilities. They also complained that the school annex would be attended by students up to age twenty-one, rather than the "children" identified by statute as eligible for out-of-district education.

The court found there to be no need for an environmental impact statement because there was no significant change in the use of the facilities. This fact also made the statute pertaining to construction of new facilities irrelevant. Finally, the court construed the language of the law permitting out-of-district education of "children" to apply to all individuals under twenty-one who remained eligible for free public education.

In Ohio, the appellate court has considered the effect of a school's charter on the merger of school districts and transfer of entire grades to other facilities.[5] When two local boards merged, the high school students of one of the former districts were immediately reassigned to the other district's high school. The state board of education noted these changes but did not revoke the charter permitting the first district's building to house high school classes. Several years later the combined local school board proposed the transfer of all eighth-grade students into the facilities of the second district. Parents protested. The trial court ruled that since the charters had not been revoked, the school board was required to keep eighth-grade *and* high school classes in the respective facilities of the first district.

The court of appeals disagreed. The school's charter was simply certification by the state board of education that the school met prescribed standards. It did not override the local board's statutory power to control the district's schools and assign students in what the board found to be an appropriate manner.

---

4. Schweiss v. Ambach, 471 N.Y.S.2d 167 (N.Y. App. Div. 1983).

5. Ferris v. Paulding Exempted Village School Dist. Bd. of Educ., 454 N.E.2d 957 (Ohio Ct. App. 1982).

Nebraska has clarified the procedure to be followed in appealing the decision of a county superintendent of schools to dissolve a school district.[6] In this case, the notice of appeal, the appeal bond, and the request for transcripts were served on (rather than "filed" with) the superintendent, who thereby had no power to approve the surety of the appeal bond. The superintendent asserted that these were flaws sufficient to prevent the district court from having jurisdiction.

The court disagreed. The procedures followed were analogous to those used for appeals from the county courts to the district court, as indicated by statute. To hold otherwise would mean that the superintendent, the adverse party, could fail to approve the surety of an appeal bond and so deprive the appealing party of the right to appeal and the district court of jurisdiction. If there was a flaw in the bond, the proper remedy was to amend it, not dismiss the action.

1.2 POWERS AND DUTIES OF SCHOOL BOARDS

As a general principle, courts will not interfere with the discretionary powers of school boards unless the board's activities are arbitrary, capricious, or illegal. The source of power of a local board of education is from either the state legislature, state constitution, or the state board of education.

1.2a General Powers

The power of a local school board to exercise its discretion in selecting which of several schools to close was challenged in Illinois.[7] The board solicited a list of criteria for use in evaluating the schools involved. Ultimately the board decided to close the oldest school in the district, even though it was not a strong choice based on the criteria supplied to the board. No findings of fact accompanied this decision. A citizens' group challenged this decision as arbitrary and also argued that acceptance of the criteria list made that list a rule the board had to use in making the decision. The trial court agreed, enjoining closure of the school building.

The appeals court reversed. The school board is a governmental body charged with maintaining the schools; it acts in a legislative manner when it decides to close a building. This decision is discretionary. The board can choose between alternatives and cannot do anything that would limit this discretion. Binding itself to a set of criteria, which the board had solicited to serve strictly as guidelines, would limit this discretion.

---

[6] Stigge v. Graves, 332 N.W.2d 49 (Neb. 1983).

[7] [illegible]ska v. Board of Educ. of Twp. High School Dist. 214, 453 N.E.2d 1344 (Ill. App. Ct. 1983).

The court stated that only clearly arbitrary decisions would be reversed by the judiciary. There was no statutory requirement that findings of fact accompany a decision to close a school building. Ample hearings had been held and evidence taken by the board prior to its decision. The board was not required to allow the participation of the citizens' group in the decision-making process; its decision was not arbitrary.

A local school board's inability to contract away the power to decide whether or not to continue to use a particular school building was declared by the Missouri court.[8] The board, responding to pressure from a neighborhood coalition, had originally agreed to operate for three years an experimental school in a building previously scheduled for closing. While steps were taken to fulfill this agreement, two months before the school was to begin severe budget deficits forced abandonment of the project as well as cutbacks throughout the school system. The coalition sued.

The court held that the decision to open or close any school was a governmental function of the school board. Governmental functions could not be contracted away, and any agreement to do so was void.

The Texas Court of Civil Appeals has examined the inability of an individual school board member to bind the entire board.[9] Plaintiff was leasing a former schoolhouse; the lease contained an option to buy the property. During the term of the lease plaintiff told one board member he was exercising the option. The lease expired and the plaintiff continued to pay rent. Three years later he tried to pay the balance of the purchase price but the school board refused to surrender title. The trial court found in favor of the school board.

The appellate court agreed, finding that Texas law was settled that when the legislature had committed a matter to another governing body, that body could act on the matter only at properly called meetings of which all members had notice. There was no evidence that the board had appointed the individual member to be its agent for receipt of the notice regarding exercise of the option. Nor was there evidence that the board as a whole received actual notice in any way during the term of the lease of plaintiff's plan to buy the property.

---

[8] Coalition to Preserve Educ. on Westside v. Kansas City School Dist., 649 S.W.2d 533 (Mo. Ct. App. 1983).

[9] Thermo Products Co. v. Chilton Indep. School Dist., 647 S.W.2d 726 (Tex. Civ. App. 1983).

A Florida appellate court has upheld the power of a local school board to change attendance boundaries so that racial mixtures could be maintained in the district's schools.[10] The school board had the authority to decide on a policy of continuing a racial mixture in each of its schools even after the system was initially desegregated. A boundary line change is a quasi-legislative function and will be overturned only if shown to be a flagrant abuse of discretion.

1.2b Authority to Provide Instruction

A New Jersey court has addressed the issue of a local board of education's control over a driver education program.[11] The local board required classroom hours in driver education, but behind-the-wheel training was offered only after school hours, for a fee, by the Adult Evening School. The education association argued that the New Jersey constitution's "Thorough and Efficient Clause" required the board to provide behind-the-wheel training as well as classroom instruction. The administrative law judge found that classroom instruction, but not behind-the-wheel training, was required by the state constitution. The commissioner of education set aside this finding, holding that no component of driver education was constitutionally mandated. The state board of education agreed.

On appeal, the superior court found the local board of education's decision to provide only classroom training to be discretionary and within the broad scope of the local board's power to determine curriculum. The availability of behind-the-wheel training only on an after-hours fee basis did not violate the "Thorough and Efficient Clause."

South Carolina has determined that public schools offering optional summer classes may charge tuition without violating statutory or constitutional mandates of free public education.[12] The legislature was directed by the state constitution to provide for free public education. It did so by establishing a school term of a certain length with teacher salaries paid for this term. Optional summer classes were not part of this term and so there was no obligation on the part of the school board to make them cost-free to students.

1.2c Power to Contract

A Tennessee case discussed control of school administration when both a county and the city serving as county seat maintained school systems.[13] The only high school was a part of the city system; county students attended at no charge. A new high school was built with county funds outside city limits to eliminate overcrowding. By a contract between the city and county school boards, the city's board of education was to administer both schools. The contract also provided that the new school was to be leased to the city so long as it was used as a school, and that the city's school commission would devise a zoning plan for assigning city and county students between the schools. The county agreed to pay a charge to the city for county students attending either school.

---

[10] Plantation Residents Ass'n v. School Bd. of Broward Cty., 424 So. 2d 879 (Fla. Dist. Ct. App. 1982).

[11] Parsippany-Troy Hills Educ. Ass'n v. Board of Educ., 457 A.2d 15 (N.J. Super. Ct. App. Div. 1983).

[12] Washington v. Salisbury, 306 S.E.2d 600 (S.C. 1983).

Eleven years later the county school board demanded an equal voice in administration. The city refused. The chancellor held the contract to be silent on the issue and decided for the county. The court of appeal agreed.

The Supreme Court of Tennessee reversed. The court held that the intent of the parties at the time the contract was made was controlling. Even though the contract did not directly address the question, the passage of eleven years without county objection to city control, plus the clear implications of the contract, established the right of the city board of education to exclusively administer both high schools.

A recent Michigan case confirms that a school board that subsequently ratifies unauthorized acts of its agent is bound by those acts, even when a resulting contract is merely oral.[14] Here, the board's exclusive land agent sold land to a local resident with the understanding that the school board and the purchaser would share equally in the costs of paving an access road. Minutes of the school board were consistent with the terms of the unwritten contract. These minutes were held to be sufficient evidence of ratification.

1.3 THE PUBLIC'S RIGHT TO KNOW: OPEN MEETING LAWS

1.3a Meetings

A local school board in Montana had its decision to fire a nontenured teacher challenged for being in violation of the state open meeting law.[15] At the close of its monthly public meeting at which many people spoke regarding the teacher's retention, the board indicated its plan to meet in special session four days later to discuss teacher contracts. Two days later a time for the meeting was set; no notice was printed because of newspaper deadlines but local radio stations broadcast the information. School districts are not specifically required by Montana's Open Meeting Law to publish notice of special sessions of the board. At the special meeting the board went into closed session to discuss contracts. One month later, the day before the next regular public board meeting, the teacher was given termination notice. The issue was reconsidered, with further public input, at the public meeting.

---

[13] Hamblen Cty. v. City of Morristown, 656 S.W.2d 331 (Tenn. 1983).

[14] Bruno v. Zwirkoski, 335 N.W.2d 120 (Mich. Ct. App. 1983).

[15] Sonstelie v. Board of Trustees School Dist. No. 10, 658 P.2d 413 (Mont. 1983).

The court found no violation of the open meeting law. Extensive public comment was heard by the board regarding the contract and the board properly went into executive session to protect individual teachers' privacy when deciding on contract renewal.

The "Florida Sunshine Law" has been held to apply to the organizational meeting of a county school board's sex education policy task force.[16] The law prohibits absention from voting by members of governmental boards and agencies. The court indicated, however, that a roll-call vote was not necessary to satisfy the statute. All that was required was that the minutes either record a specific vote or count a vote for each member present.

1.3b Notice of Meetings

The Minnesota Supreme Court had occasion to construe that state's open meeting law as it applied to local school boards.[17] The court held that whereas the law does not require prior public notice of chance or social gatherings, when all members of a school board and district administrators meet to gain background information on current issues faced by the board it is a "meeting" under the law. This is so even when no official action is taken at the gathering. Public notice of the meeting must be given because the events of the meeting could influence a later decision by the board.

The Minnesota Supreme Court again had occasion to interpret the state's open meeting law, as it applied to school boards, in a decision that dealt with the statutory procedures for closing a schoolhouse.[18]

The board published separate notice of the proposed closing of each of three high schools, citing declining enrollment and correspondingly reduced state revenues, and public hearing was held on each proposed closing. When the board was unable to agree on which school to close, a fact-finding panel was selected. No final hearing was held before the board acted on the panel's recommendation. Prior to the final decision, individual members of the board in groups from two to all members met regarding the situation. The trial court found these meetings violated the open meeting law; there was found to be no flaw in the notice and hearings held prior to the closing of one of the schools.

---

[16] Ruff v. School Bd. of Collier Cty., 426 So. 2d 1015 (Fla. Dist. Ct. App. 1983).

[17] Saint Cloud Newspapers, Inc. v. District 742 Commun. Schools, 332 N.W.2d 1 (Minn. 1983).

[18] Moberg v. Independent School Dist. No. 281, 336 N.W.2d 510 (Minn. 1983).

The Minnesota Supreme Court agreed that all notice and hearing requirements had been met. It held, however, that the state's open meeting law applied only to gatherings of a quorum or more of a governing body or its official subgroups during which members discuss, decide, or receive information as a group on issues relating to official business. In this case the only meeting of at least a quorum of board members was not for one of the specified purposes, and so no violation of law had occurred.

1.3c Taping Meetings of the Board

The right of individuals to tape-record school board meetings in public session under an open meeting law has been upheld in Rhode Island.[19] While constitutional issues were also involved, the federal district court settled the question by evaluating the heart of open meeting laws: The public's right to know, and the accountability of governing bodies. So long as the school board meets in public session, no compelling governmental interest or even rational basis exists for a ban on recording. The keeping of official minutes does not reduce the value of other records; official minutes are no less subject to alteration than are tape recordings; an individual speaking at a public meeting can only be helped, not inhibited, by the existence of an immediate record of his words in context.

1.4 SCHOOL BOARDS AND CONFLICTS OF INTEREST

The federal appellate court has considered the legality of school board contributions to a campaign to defeat a proposed tax reform.[20]

An amendment to the Colorado Constitution would have required prior voter approval of all legislation that would raise taxes. A local school board contributed cash from its public funds and employee labor to defeat the amendment. The board argued that the tax reform was the sort of situation intended by a state law allowing state and political subdivisions to contribute only to those campaigns involving issues in which they have official concerns. The board pointed out that its operation depended on tax revenues.

---

[19] Belcher v. Mansi, 569 F. Supp. 379 (D.R.I. 1983).

[20] Campbell v. Joint Dist. No. 28-J, 704 F.2d 501 (10th Cir. 1983).

The court disagreed. It found that the statute authorized contributions only when the issues were ones that would come before the board for an official decision. As a result, the contributions made by the local school board were unlawful and had to be reimbursed.

1.5 SCHOOL DISTRICT AND BOARD MEMBERS ELECTIONS, APPOINTMENT, AND RECALL

1.5a Voting Irregularities

A 1984 lawsuit concerned the validity of an Alabama statute dealing with school board elections.[21] By law, residents of cities served by independent school boards could also vote in elections for county school board members. County residents sought to have the 1980 elections voided because the county vote was unconstitutionally diluted by the vote of city residents who allegedly lacked a sufficient interest in the county school system. The trial court found the law to be constitutional.

The appellate court reversed. The city residents contributed less than three percent of the county school system's budget, and a statewide educational trust fund provided money through a formula unrelated to local contributions. The court found that city residents lacked a substantial interest in the composition of the county school board and ordered new elections.

1.5b Election Contests

An Illinois court held that two ballots cast in a contested school tax referendum should not have been counted because they were spoiled.[22] State law required that exact steps be followed in preparing duplicate ballots. These steps were not followed, and, because the procedures were mandatory, the court could not permit those ballots to be counted, even though this caused the tax measure to pass rather than fail.

The Arkansas legislature faced a challenge to its new statute requiring school board members in districts beyond a certain population to be elected from zones within the district.[23] At the time, only one school district was large enough to be covered by the new law.

The state supreme court applied the general rule that acts of the legislature are presumed to be constitutional. The plaintiff had failed to prove that the statute was arbitrary, and any school district could arguably grow to the point of coming within the statute.

---

[21] Hogencamp v. Lee Cty. Bd. of Educ., 722 F.2d 720 (11th Cir. 1984).

[22] Larson v. Board of Educ., Bement Commun. School Dist., 455 N.E.2d 866 (Ill. App. Ct. 1983).

[23] Phillips v. Giddings, 646 S.W.2d 1 (Ark. 1983).

1.5c Recall of Board Members

In Mississippi, the recall of school board members was challenged under the Voting Rights Act.[24] As a result of petitioning, three black members of a local school board were faced with a recall referendum. They challenged the application of the state recall statute, alleging that it violated their civil rights and the civil rights of the minority voters who had elected them by denying the right to vote on account of race.

The court found that there was no case under the Voting Rights Act. While the recall referendum could alter the results of the prior election by removing blacks from office, the procedure would not restrict meaningful access of any minority to the political process. The right to vote does not entail the right to have a minority candidate elected or retained in office despite proper petitioning for recall.

A recent Texas case examined the procedures for challenging a duly elected school board member's further actions, on the basis that the member was not a registered voter at the time of election.[25] An individual voter filed suit, asking that the member be enjoined from further action on the school board. The trial court found that the member was in fact not a registered voter, and granted the injunction.

On appeal, the court agreed that the member was not a registered voter. It found, however, that under the Texas Constitution and State Election Code the state was an indispensable party to any suit for the removal of school board members. The individual voter had no interest in the outcome that was not equally a concern of the general public; the state was the only proper representative of this interest. Since the suit had not been brought by the state, the trial court had no authority to grant the injunction.

In a case from New Mexico, the state supreme court agreed with the trial court that the petitions for a school board recall election were valid despite premature signing of affidavits by those circulating the petitions.[26] The circulators mistakenly believed that they had to sign the affidavits before obtaining signatures, rather than afterwards as required by law. The court refused to invalidate the recall election results in the absence of legislation setting such a penalty for a technical flaw in the affidavits. The trial court had specifically found no evidence of fraud in the circulation procedures or signatures obtained.

1.5d Method of Selection of Board Members

A recent Georgia case declared invalid a referendum held to change the method of selecting the county school board because of the activities of certain poll watchers.[27] The individuals were employees of the county board of education, who "checked off" voters from a voting list. Sometimes this occurred within the zone where campaign activities are prohibited.

---

[24] Smith v. Winter, 717 F.2d 191 (5th Cir. 1983).

[25] Blackmon v. Harland, 656 S.W.2d 239 (Tex. Civ. App. 1983).

[26] Montoya v. Lopez, 659 P.2d 900 (N.M. 1983).

Even though it was not shown that these activities affected the referendum result, they were illegal. The court found this to be enough to taint the election.

The Kansas courts recently addressed two questions of school board procedure.[28] First, does a school board have the authority to consider, at a regular meeting, matters that did not appear on the published agenda? This involved the state open meeting law. Second, how many votes are required to fill a vacancy on a school board?

With regard to the freedom of the school board to consider matters outside a published agenda, the court noted that the Kansas Open Meeting Law does not require prior publication of agenda. The standing practice of the school board to permit addition of items to the agenda at the start of all regular meetings was approved.

The court turned to the statutes to resolve the question of votes needed to fill school board vacancies. It found that the general statute controlled, which required a vote by the majority of the full membership of the board. Thus, when two members of a seven-person school board resigned, a vote of four of the remaining members was required to fill the vacancies.

1.5e Disqualification of Candidates

In a New York case, a candidate for the local school board challenged a proceeding to invalidate her petition to be placed on the ballot.[29] The challenge was based on her alleged lack of residency in the district. The court had provided for notice of this proceeding to be served by first class mail, by personal service, or by leaving the notice at her residence plus mailing a copy. Notice was sent instead by certified mail and was not delivered until three days after the deadline. Nevertheless, the court found that the candidate had waived her valid objection to the defective service by appearing in court and litigating the question as to her eligibility as a candidate. It also found her not to be a legal resident of the district and so ineligible for a position on the school board.

---

[27] Stiles v. Ernest, 312 S.E.2d 337 (Ga. 1984).

[28] Unified School Dist. No. 407 v. Fisk, 660 P.2d 533 (Kan. 1983).

[29] Gregory v. Board of Elections of New York City, 461 N.Y.S.2d 430 (N.Y. App. Div. 1983).

1.6 SCHOOL DISTRICT ORGANIZATION

Mississippi recently confronted the issues raised when a municipality with its own school district annexed county land lying within a different district.[30] In one instance, residents of the annexed area petitioned for a referendum vote on whether their area was to be taken over by the municipal school district.

The court refused to allow the referendum. It interpreted the pertinent statutes and found that only when a municipality annexes land in a separate county is a referendum permitted. When, as here, the municipality's principal office is in the same county as the annexed land, the county school district automatically merged into the municipal school district.

In an Arkansas case resolving a dispute over school district boundaries, the appellate court indicated it would overturn the trial court decision only if it was clearly against the preponderance of the evidence.[31]

The Violet Hill and Oxford school districts both wanted the tax revenues and students of nine particular sections. Maps dated 1936 and 1971, plus the initial testimony of the County Supervisor in office from 1937 to 1972, showed these sections to be in the Violet Hill District (established in 1937). Two maps printed in 1976 both showed visible alterations of the boundary line placing the sections in the Oxford District. The appellate court found this to be sufficient evidence to support the trial court's finding that all nine sections lay within Violet Hill.

The Illinois appellate court addressed the appropriateness of injunctions and intervention by affected students in the situation of the transfer of property from one school district to another.[32] In this case, proceedings were pending with the Regional Board of School Trustees to discuss transfer of the land. The receiving district unilaterally decided to accept the five affected students and hold their out-of-district tuition in escrow until the board acted. The other school district sought to enjoin the receiving district. Parents of the affected students tried to intervene.

The court held that the school district had failed to show that irreparable harm would result if the students were transferred. There was no evidence that only inadequate legal remedies existed. It also ruled that the trial court had not abused its discretion in permitting intervention, since no delay or prejudice to the original parties resulted.

---

[30] Western Line Consol. School Dist. v. Greenville Mun. Sep. School Dist., 433 So. 2d 954 (Miss. 1983).

[31] Izzard Cty. Bd. of Educ. v. Violet Hill School Dist. No. 1, 663 S.W.2d 207 (Ark. Ct. App. 1984).

[32] Board of Educ. of Niles Twp. v. Board of Educ. of Northfield Twp., 445 N.E.2d 464 (Ill. App. Ct. 1983).

The Illinois appeals courts have made it clear that there are certain factors that must be considered when school boards discuss the transfer of land from one school district to another.[33] The courts focus on the effects the transfer would have on the "whole child" and the "community of interest." The goal was to assign land to the school district most completely reflecting the sense of community that future residents would feel, and most fully providing for the social as well as educational growth of the students.

Nebraska was the setting of a case involving the transfer of property between school districts.[34] The property owner's land lay within two districts. The children attended school in the district containing the residence. The property owner requested that the freeholder board transfer all their land to the other district, asserting that it was in the best educative interests of the children to do so. The board of freeholders refused, but the trial court granted the property owner's petition. The board appealed.

The Nebraska Supreme Court held that its review was to be de novo. The court reexamined the testimony and held that what constitutes the best educative interests of a child was not solely a matter of expert opinion: the opinions of the parents and the student involved were also relevant. The court accepted proof of the accreditation of the respective schools, educational efficiency, management, and curricula and affirmed the district court. The rejection by the board of freeholders of the transfer request was found to have been arbitrary and capricious.

The Illinois appellate court recently confirmed the action by a regional school board that rejected a petition for detaching territory from one school district and annexing it to another.[35]

The school code did not indicate the form or procedure for such a petition. Plaintiffs collected signatures from a large number of registered voters residing in the detachment area, more than the number required by the election code for similar petitions if the plaintiffs' count of registered voters was correct. Defendants challenged the count of registered voters used by plaintiffs because it was several hundred voters less than the county's official registration lists showed. (Plaintiffs had gone to each address and asked about the registered voters shown there; if informed that the voter no longer lived there the name was crossed off.) Originally the school board accepted the plaintiffs' count of total registered voters, found it had jurisdiction to consider the petition, but refused detachment after a hearing in which only one witness spoke against detachment. On appeal, the trial court ruled that the board's decision was against the weight of the evidence, but also that the board could reconsider whether it had jurisdiction.

---

[33] City Nat'l Bank of Kankakee v. Shott, 447 N.E.2d 478 (Ill. App. Ct. 1983).

[34] Kaufmann Farms, Inc. v. Hutsell, 330 N.W.2d 907 (Neb. 1983).

[35] Shapiro v. Regional Bd. of School Trustees of Cook Cty., 451 N.E.2d 1282 (Ill. App. Ct. 1983).

The board did reconsider. Following a hearing in which both sides participated, the board determined that it lacked jurisdiction regarding whether plaintiffs' count of registered voters was faulty. Consequently, it dismissed the petition. It issued findings of fact and conclusions of law regarding jurisdiction at a later date.

The appeals court held that the board did not err by failing to put its findings "on the record" at the time of dismissing the petition. All that was required was that the findings ultimately made be based on the prior evidentiary record. The court also found the board to be correct in rejecting the plaintiffs' count of registered voters. The board was free at any time to reexamine whether it had jurisdiction, even without a suggestion from the court to do so. It was proper to use the election code alongside the school code in determining whether voters residing in the detachment zone were to be counted as registered. Plaintiffs should have relied on the official registration lists as required by the election code, or challenged those lists by the procedure set by code rather than through the use of hearsay.

1.7 SCHOOL BOARDS AND THE TRANSPORTATION OF STUDENTS

1.7a Bus Contracts

In a case involving notice of a claim for compensation against a school board, the New York Court of Appeals stressed the importance of compliance with procedures set by statute.[38]

During a wildcat strike, the bus service did not provide transportation under its contract with the board because of the alleged risk of violence. The company wanted to be paid under the contract for the period of the strike and so sent a letter to the Director of the Bureau of Pupil Transportation. The law required that notice of claims be given directly to the board of education. The bureau forwarded the letter to the board's office of legal services, which denied the claim.

The court indicated that whereas all that was required was substantial compliance with the statute setting out the contents of a notice of claim for compensation, it was necessary to deliver this notice directly to the proper governing body.

---

[38] Parochial Bus Sys., Inc. v. Board of Educ., City of New York, 470 N.Y.S.2d 564 (N.Y. 1983).

The New York courts upheld a local school board's decision to rescind petitioner's conditional contract for transporting students.[37] The court agreed that it was a reasonable determination that petitioner was not a "responsible bidder" due to a prior criminal conviction.

1.7b Bids

The Indiana courts have upheld the right of a school board to reject the sole bid on a busing contract when the rejection is not arbitrary or capricious.[38]

The bidder submitted the only bid on a certain route. Advisors to the school board recommended rejection of the bid because it was excessive when compared to similar routes. On rebidding, that route and four others were awarded by the board to a fleet bidder at a significant savings. On appeal to the trial court, the original bidder received damages for loss of the route.

The appeals court reversed. By statute the school board had the power to reject unsatisfactory bids. There was sufficient reason for the decision to reject the original bid and grant the route to the fleet bidder. The court refused to reverse a school board decision that was lawful and rational.

The New York courts have considered the impact of the state's competitive bidding statues on the awarding of busing contracts by local boards of education.[39] Petitioner complained that the board had failed to provide daily trip schedules for the year being bid; it also objected that the current year's daily trip schedule was provided only to its competition for the contract. In defense, the board asserted that current route information was available to all bidders and that petitioner knew this from past experience. The company awarded the route pointed out that no bidder knew the trip schedule for the bidding year, so all were treated equally. The court held that petitioner had made no reply to these defenses and no triable issues remained. The petition was dismissed.

---

[37] Crescent Bus Corp. v. Board of Educ. of New York City, 463 N.Y.S.2d 259 (N.Y. App. Div. 1983).

[38] Metropolitan School Dist. of Martinsville v. Mason, 451 N.E.2d 349 (Ind. Ct. App. 1983).

[39] We Transport, Inc. v. Board of Educ. of Uniondale, 462 N.Y.S.2d 286 (N.Y. App. Div. 1983).

1.7c Duty to Provide Transportation

The Wisconsin Court of Appeals recently interpreted an ambiguous state law pertaining to the transportation of school children.[40] By statute, school systems must provide transportation to all public and private school students residing more than a set distance from their school; there must be "reasonable uniformity" in transportation for public and private students. Cities beyond a certain population are exempted from the need to transport students if transportation through a common carrier is "available."

The court determined that the uniformity requirement referred to the distance a student had to live from school before qualifying for free transport. There could not be different distances set for public and private students. The court also settled that transportation by a common carrier need not be available to all students in the city before the city could exercise the option to rely on such transportation for students.

---

[40] Saint John Vianney School v. Board of Educ. of School Dist. of Janesville, 336 N.W.2d 387 (Wis. Ct. App. 1983).

2

EMPLOYEES

Joseph C. Beckham

- Introduction 2.0
- Discrimination in Employment 2.1
  - Race 2.1a
  - Sex 2.1b
  - Age 2.1c
  - Handicap 2.1d
- Substantive Constitutional Rights 2.2
  - Speech and Association 2.2a
  - Religion 2.2b
- Procedural Due Process 2.3
  - Property Interest 2.3a
  - Liberty Interest 2.3b
  - Aspects of Notice 2.3c
  - Aspects of Hearing 2.3d
- Dismissal and Discipline 2.4
  - Insubordination 2.4a
  - Unprofessional Conduct, Immorality, or Unfitness 2.4b
  - Incompetency and Persistent Negligence 2.4c
- Reduction in Force and Abolition of Position 2.5
  - Necessity for Reduction in Force 2.5a
  - Elimination of Position 2.5b
  - Selection of Employee 2.5c
  - Seniority and Reassignment 2.5d
- Contractual Disputes 2.6
  - Contract Provisions and Board Policies 2.6a
  - Administrative Regulations and State Statutory Provisions 2.6b
- Tenure 2.7
  - Probationary Period 2.7a
  - Tenure by Default or Acquiescence 2.7b
  - Tenure Status 2.7c
- Certification 2.8
  - Certification Standards 2.8a
  - Decertification, Revocation, or Suspension 2.8b

2.0 INTRODUCTION

Cases selected for inclusion in this chapter involve public school employees or local, state, or federal education agencies as principal parties and do not include employment issues in the private sector. The analysis specifically excludes consideration of cases involving unemployment or workers' compensation, retirement, or pensions and benefits. Further, issues related to liability under section 1983 of the Civil Rights Act of 1964 are dealt with in another chapter of the *Yearbook.*

2.1 DISCRIMINATION IN EMPLOYMENT

The shifting burden of proof in discrimination cases involving alleged violation of federal statute law continues to dominate litigation in the public employment sector. While appellate decisions often deal with federal constitutional questions as well, the predominant issues in current discrimination suits deal with provisions of Title VII and section 1983 of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act.

2.1a Race

In a case that presents the issue of a federal court's authority to impose a racial quota for the hiring of black teachers once a constitutional violation of equal protection of the laws has been found, the Sixth Circuit Court of Appeals has struck down an order of the federal district court that imposed a racial quota on a school district's teaching staff and nullified contractual seniority rights. In considering the issue, the circuit court balanced the interests of students in correcting past discriminatory practices against what was characterized as the "strong expectations of teachers" relying on contractual seniority rights. While the court recognized that a desegregation remedy might require a quota in hiring where the evidence of discrimination was sufficiently egregious, it held that under the circumstances of this case the school district's good faith efforts to comply with an affirmative action plan in new hirings and to actively recruit black faculty over a ten-year period were sufficient. Further, the circuit court held as a matter of law that the evidence did not justify the nullification of seniority rights to vindicate student constitutional rights when the projected percentage of black faculty after seniority based layoffs would be comparable to a number of relevant market statistical indicators defining black participation in the labor market.[1]

---

[1] Oliver v. Kalamazoo Bd. of Educ., 706 F.2d 757 (6th Cir. 1983).

In an employment discrimination action, a school district's use of a quota system for hiring black staff was successfully challenged. A quota system under which each school was required to employ between 75 percent and 125 percent of the existing proportion of black teachers employed citywide at that school's respective level in the school system was held to violate equal protection and the Civil Rights Act. The quota system was used to maintain faculty racial balance after the school faculties were successfully integrated, but the district failed to show that the system would revert back to prior levels of segregation if the quota system was not maintained.[2]

The imposition of a "one-to-one" minority hiring goal and an order specifying that future layoffs be made on a percentage basis to guarantee maintenance of ratios of minority to majority teachers has been approved by the Second Circuit Court of Appeals. That such a mandate would infringe on the contractual rights of majority teachers did not render the plan invalid, though the court did review and reverse aspects of the hiring goals that were considered unduly harsh in application to probationary and permanent teachers.[3]

A history of de jure discriminatory practices, statistical evidence of disparate employment practices, and subjective hiring standards in selection processes have been held sufficient to compel a finding of employment discrimination as to a black Alabama teacher-coach who was denied a position as head coach. The coach's Title VII claim, once established, was not sufficiently refuted by the school board's assumption that the teacher-coach was not interested in applying for the position, because the selection process utilized by the board lacked proper notice and uniform selection criteria.[4]

A black female applicant who qualified for a position as a special education supervisor was denied the opportunity to interview for the position. A Pennsylvania appellate court sustained the findings of a state administrative board that the district's failure to interview the candidate constituted unlawful sex and race discrimination and the district's reasons for failing to hire were a pretext for unlawful discrimination.[5]

In a case that initially arose under the rigorous standards of judicial review established under the *Singleton*[6] standard, the Fifth Circuit

---

[2] Kromnick v. School Dist. of Philadelphia, 555 F. Supp. 249 (E.D. Pa. 1983).

[3] Arthur v. Nyquist, 712 F.2d 816 (2d Cir. 1983). *See* Tasby v. Wright, 713 F.2d 90 (5th Cir. 1983). The Fifth Circuit found no error in a district court's revision of minority hiring goals that were reasonably related to the ultimate objective of eliminating the vestiges of past racial discrimination.

[4] Harris v. Birmingham Bd. of Educ., 712 F.2d 1377 (11th Cir. 1983).

[5] Harrisburg School Dist. v. Pennsylvania, 446 A.2d 760 (Pa. Commw. Ct. 1983).

[6] *See* Singleton v. Jackson Mun. Sep. School Dist., 419 F.2d 1211 (5th Cir. 1969).

Court of Appeals reviewed a decision in which a black football coach was demoted to a position as assistant coach during unification of a previously segregated school system and later passed over for promotion during the implementation of a desegregation plan. The appellate court held the coach had failed to establish any violation of his civil rights in the employment decisions of the school district during the desegregation period.[7]

A South Carolina federal district court's reliance on the burden of proof in Title VII cases was considered misplaced by the Fourth Circuit Court of Appeals. The plaintiff, a black school principal, challenged his dismissal by presenting evidence of pervasive discriminatory practice within the desegregated school district. Although the district court recognized a prima facie case, the school district was compelled to do no more than articulate a legitimate nondiscriminatory basis for the alleged discriminatory practice. The appeals court remanded, insisting that further inquiry determine whether there was a recent history of racial segregation or evidence of intentional segregative action. If found, such evidence would place the burden on the school district to show "clear and convincing evidence" justifying the administrator's dismissal.[8]

An Alabama school board's policy expressing a preference for qualified insiders would not give rise to an inference of racially discriminatory intent upon a showing that an outside applicant was selected over a black employee of the district. The Eleventh Circuit Court of Appeals concluded that the principal concern under the circumstances would be to determine whether the district's hiring decision was based on the outside applicant's superior qualifications or the minority status of the rejected employee.[9]

The alleged actions of black parents who sought to remove the white principal of a predominantly black elementary school were viewed as sufficient to justify a cause of action for conspiracy to deny civil rights, defamation, and tortious interference with contract under federal law. Among actions that were supposedly designed to force resignation were school boycotts, office demonstrations, and other harassment.[10]

2.1b Sex

A showing that, in choosing a replacement for a position as an elementary school principal, an Alaska school board failed to use the same criteria or to undertake a fair comparison of the female applicant's qualifications and abilities in relationship to the male applicant selected was sufficient to establish a prima facie case of sex discrimination.[11]

---

[7] Peques v. Morehouse Parish School Bd., 706 F.2d 735 (5th Cir. 1983).

[8] Knighton v. Laurens Cty. School Dist., 721 F.2d 976 (4th Cir. 1983).

[9] Clark v. Huntsville City Bd. of Educ., 717 F.2d 525 (11th Cir. 1983).

[10] Stevens v. Tillman, 568 F. Supp. 289 (D. Ill. 1983).

A Colorado school district was able to articulate a legitimate, nondiscriminatory reason for refusing to select the female applicant for a position as school principal and director of special education. Although the plaintiff was able to establish a prima facie case of disparate treatment under Title VII, the school district's rationale that other candidates were more qualified and that there were doubts about the female applicant's ability to get along with others was sufficient to overcome a prima facie case.[12]

The Eighth Circuit Court of Appeals overruled a district court determination and held that a school district's stated reasons for selecting a male candidate over a woman applicant for a principalship met the burden to establish a legitimate, nondiscriminatory reason for the hiring and were not a subterfuge for discrimination. The district established that it hired the male because of the female applicant's lack of administrative experience and her negative references.[13]

A South Carolina school district overcame a claim of sex discrimination under Title VII by establishing clear and convincing evidence that a female applicant for a position as an assistant principal would not have been hired for the position absent discrimination. Evidence in the lower court record established that four of five job interviewers would have selected another female applicant ahead of the plaintiff for reasons other than prohibited sex discrimination. Two female applicants, other than plaintiff, were promoted to administrative positions shortly after the interviews for assistant principal. Since plaintiff did not suffer damage as the result of the alleged discrimination, an award of promotion and back pay was reversed.[14]

A school district's determination that a male applicant should be selected as vice-principal because of superior qualifications was upheld by an Indiana federal district court upon a finding that the district's selection rationale was not a pretext for sex discrimination.[15]

---

[11] Strand v. Petersburg Pub. Schools, 659 P.2d 1218 (Alas. 1983). *See* Garza v. Brownville Indep. School Dist., 700 F.2d 253 (5th Cir. 1983). A female applicant for a position as assistant principal was successful in establishing a claim of sex discrimination under Title VII and had the right to a remedy that included an offer of the next avail. comparable position.

[12] Verniero v. Air Force Academy School Dist. No. 20, 705 F.2d 388 (10th Cir. 1983).

[13] Danzl v. North St. Paul-Maplewood-Oakdale Indep. School Dist., 706 F.2d 813 (8th Cir. 1983).

[14] Patterson v. Greenwood School Dist., 696 F.2d 293 (4th Cir. 1982).

[15] Parker v. Board of School Comm'rs of City of Indianapolis, 558 F. Supp. 680 (S.D. Ind. 1983).

Pregnant teachers seeking sick leave benefits met with disqualifying policy standards in two state court decisions. New Jersey State Board of Education policy was held reasonable in creating a presumptive period of disability, provided a teacher applying for a longer period of sick leave could present medical certification of the specific nature of her disability.[16] The North Dakota Supreme Court upheld a board's presumptive allowance for three weeks of sick leave following delivery, even though physicians for three teachers recommended that the teachers not return to work for six weeks. In the latter case, the court regarded evidence adduced at trial as demonstrating the teachers were physically able to return to work after three weeks.[17]

A school district policy that denied disability compensation for pregnancy but allowed use of accumulated sick leave for any other certified disability has been declared unlawful sex discrimination by a Pennsylvania appeals court.[18] And, in a related case, a federal appeals court has ruled that a California school district must provide medical benefits for pregnancy-related conditions of female employees' spouses at the same coverage level as is provided to male employees' spouses.[19]

An untenured female teacher, employed as a substitute following her second pregnancy leave, overcame a statute of limitations defense by asserting that she was discriminated against because of her sex when the school district refused to employ her in a full-time position on the basis of prior involuntary pregnancy resignations. Her allegation was held sufficient to constitute a continuing wrong that overcame the defense that her claim was time barred.[20]

2.1c Age

A maximum age of sixty-five for school bus drivers was held both necessary and reasonable considering safety risks and fell within the bona fide occupational qualification exception to the Age Discrimination in Employment Act.[21]

2.1d Handicap

A blind applicant for an Arkansas school library position failed to demonstrate that she was denied employment solely by reason of her handicap or as the result of invidious discrimination violative of equal protection of the laws. Having initially established a prima facie case, the applicant was unable to show that the reasons given for denying her the position were pretextual and designed as a subterfuge to hide discrimination. The school board's articulated reason for not hiring the applicant focussed on the superior experience, training, and evaluation references of a competing applicant.[22]

---

[16] Hynes v. Board of Educ. of Bloomfield, 461 A.2d 1184 (N.J. Super. Ct. 1983).

[17] Crowston v. Jamestown Pub. School Dist. No. 1, 335 N.W.2d 775 (N.D. 1983).

[18] Dallastown Area School Dist. v. Pennsylvania Human Rel. Comm'n, 460 A.2d 878 (Pa. Commw. Ct. 1983).

[19] United Teachers, Los Angeles v. Board of Educ., City of Los Angeles, 712 F.2d 1349 (9th Cir. 1983).

[20] Mamos v. School Comm. of Town of Wakefield, 553 F. Supp. 989 (D. Mass. 1983)

[21] Maki v. Commissioner of Educ., 568 F. Supp. 252 (N.D.N.Y. 1983).

An applicant for a school bus driver's license who required a hearing aid was an otherwise qualified handicapped applicant in the opinion of the Third Circuit Court of Appeals. The court remanded the case for further consideration of the state of Pennsylvania's claim that the hearing requirement was an essential requirement of the licensure program or that revising the hearing aid policy would impose an undue burden on the state.[23]

A former school bus driver, who was denied reemployment as a bus driver due to a new regulation prohibiting the employment of drivers with missing extremities, was successful in winning equitable relief in his suit against a Texas school district. After a finding that the plaintiff was "an otherwise qualified handicapped individual" for purposes of the Rehabilitation Act of 1973,[24] the court concluded that the school district had violated federal law prohibiting discrimination against the handicapped. While no monetary damage award was allowable under the court's interpretation, plaintiff did secure an order that he be employed upon condition that he present his valid state chauffeur's license and pass a routine physical examination.[25]

2.2 SUBSTANTIVE CONSTITUTIONAL RIGHTS

Allegation of a denial of free speech or association under the first amendment is the most frequent substantive constitutional claim pressed by a plaintiff-employee in appellate cases involving an adverse employment decision. Often these claims depend on a careful analysis of factual questions initially resolved at the trial court level and reviewable only under the appellate court's "clearly erroneous" test.

2.2a Speech and Association

A Michigan school district, which placed an undercover police woman in two high school classes for the announced purpose of investigating drug trafficking, was sued by parents, students, and teachers on the grounds that the action infringed first amendment rights. The plaintiffs contended that impermissible political considerations motivated the placement of the police agent and alleged that the subsequent discovery of the covert operation stifled free speech and open discussion, interfered with academic freedom, and stigmatized teachers and students. In reviewing the plaintiffs' complaint neither the federal district court nor the Sixth Circuit Court of Appeals found any allegation of a tangible consequence, such as classroom disruption or adverse employment decision that could demonstrably be linked to a chilling effect on first amendment rights to speech and association. Absent such a direct injury or immediate threat of harm, the plaintiffs' complaint was dismissed for failure to state a cause of action on which judicial relief could be granted. The circuit court was unwilling to entertain a case in which the controversy contained no allegation of any tangible or concrete inhibitory effect on classroom expression.[26]

---

[22] Norcross v. Sneed, 573 F. Supp. 533 (Ark. 1983).

[23] Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983).

[24] *See* 29 U.S.C. § 794.

[25] Longoria v. Harris, 554 F. Supp. 102 (S.D. Tex. 1982).

A high school track coach was terminated for protesting the school board's decision to drop its junior high track program by writing a letter to the editor of the local paper. In a decision reflecting the rationale in *Pickering v. Board of Education*,[27] the Eighth Circuit Court of Appeals ruled the school board's action violated the coach's first amendment right to free speech and reinstated his employment.[28]

An Alabama teacher established a prima facie case that his dismissal was motivated by his instigation of an investigation into the improper use of football game receipts by a high school principal. On remand, the Alabama Supreme Court instructed the trial court to open the scope of inquiry into the reasons for the teacher's dismissal, placing the burden of proof on the school district to establish that the teacher could have been dismissed absent his constitutionally protected conduct.[29]

The Fifth Circuit Court of Appeals has remanded a case involving a nonrenewed public school cafeteria worker who claimed a violation of her first amendment rights based on her allegation that she was not renewed because she had enrolled her son in a private school. The appellate federal court instructed the district court to determine whether or not the protected conduct played a substantial part in the school board's nonrenewal decision and, if so, whether the employee could have been terminated for reasons other than those related to her decision to enroll her child in a private school.[30]

---

[26] Gordon v. Warren Consol. Bd. of Educ., 706 F.2d 778 (6th Cir. 1983).

[27] 391 U.S. 563 (1968).

[28] McGee v. South Pemiscot School Dist., 712 F.2d 339 (8th Cir. 1983).

[29] Abston v. Woodward, 437 So. 2d 1261 (Ala. 1983).

[30] Brantley v. Surles, 718 F.2d 1354 (5th Cir. 1983).

A probationary librarian in Michigan was held to have been denied reemployment for engaging in conduct protected under the state's Public Employment Relations Act. The librarian was terminated following an unsatisfactory evaluation citing "attitudinal problems" that were traced to her filing of an employee grievance and outspoken criticism of the principal.[31]

A prospective teacher was unsuccessful in establishing a claim that she was not hired because of her participation in partisan political activities, particularly as they related to community and school committee affairs. There was no evidence that a school committee decision not to hire her for a vacant teaching position was motivated by a desire to punish her for her political activity; therefore, she failed to establish any denial of constitutionally protected speech or associational rights.[32]

A Texas school board carried its burden to establish that the employee would have been released absent consideration of the school principal's exercise of constitutional rights. Relying on *Mt. Healthy Board of Education v. Doyle,*[33] the Fifth Circuit Court of Appeals held that evaluations by two separate superintendents over a period of nine years established that the principal had difficulty in working with parents and coworkers. Although the principal asserted that his termination was based on his refusal to support a school bond issue and on public complaints concerning the school system, the evaluation record made clear that the board relied on appropriate grounds for termination.[34]

A school psychologist, dismissed under a New York school code provision allowing for discretionary dismissal of nontenured staff, was unable to carry the burden of proof necessary to establish that her termination was in retaliation for the exercise of free speech.[35]

While a teacher's representation of union membership at board meetings and conferences is constitutionally protected conduct, a Kentucky school teacher was unable to establish a first amendment claim where such protected conduct was held not to play a substantial part in the board's decision to change her teaching schedule. No loss of benefits, salary, or rank accompanied the change, but even if the change could be considered to have a "chilling effect on free speech," there was ample evidence the recommendation for change in schedule was the result of staff cutbacks and not the employee's exercise of free speech.[36] Similarly, a Mississippi teacher failed to establish that her nonrenewal was based on her exercise of a constitutional right to union membership. The district had no obligation, under Mississippi state law, to provide a justification for nonrenewal to a probationary teacher, and since the teacher could produce no indication that the nonrenewal decision was primarily or substantially motivated by a desire to punish her for union membership or association, the Mississippi Supreme Court held there was no evidence of a violation of constitutional rights.[37]

---

[31] Napoleon Educ. Ass'n v. Napoleon Commun. Schools, 336 N.W.2d 481 (Mich. Ct. App. 1983).

[32] Smith v. Harris, 560 F. Supp. 677 (R.I. 1983).

[33] 429 U.S. 274 (1977).

[34] Yielding v. Crockett Indep. School Dist., 707 F.2d 196 (5th Cir. 1983).

[35] Forrest v. Ambach, 463 N.Y.S.2d 84 (N.Y. App. Div. 1983).

A federal court of appeals has ruled that the determination of whether a school district's vocational director was denied his rights to free speech and association in a nonrenewal of contract case is a matter for jury determination on the question of whether the board would have refused to renew the director's contract absent consideration of his expression of views on a school practice and his association with a faction on the board.[38]

A California teacher who contended that his promotion was denied based on his exercise of free speech won remand of the case when the Ninth Circuit Court of Appeals concluded reversible error resulted from an instruction that left to the jury the decision of weighing the teacher's interest in free speech against the state's interest. Such a test is a question of law, not fact, and requires a determination by the court.[39]

2.2b Religion

An Iowa school district was held to have reasonably accommodated a school employee's religious beliefs by permitting unpaid leave for Jewish High Holy Days. The Iowa Supreme Court found that the district's policy on religious leaves of absence was consistent with the provisions of the master contract and uniformly applied.[40] The same issue was raised by a Colorado school district policy that provided two days of paid personal leave per year. The policy did not violate a teacher's free exercise of religion despite the teacher's claim that the teacher sought to attend temple for two days each on Yom Kippur and Rosh Hashanah.[41]

---

[36] Reichert v. Draud, 701 F.2d 1168 (6th Cir. 1983).

[37] Tanner v. Hazlehurst Mun. Sep. School Dist., 427 So. 2d 977 (Miss. 1983).

[38] Burris v. Willis Indep. School Dist., 713 F.2d 1087 (5th Cir. 1983). *See* Bryant v. St. Helena Parish School Bd., 561 F. Supp. 239 (M.D. La. 1983). Despite the suspiciously contemporaneous timing of dismissal proceedings and a teacher's involvement with a citizens' group challenging a school board election, a federal district court has ruled that the dismissed Head Start teacher failed to establish that the school board's decision was motivated by a desire to punish for the exercise of free speech. *But see* Thomas v. Farmer, 573 F. Supp. 128 (W.D. Ohio 1983). Citing a school board's alleged campaign to punish a tenured teacher for statements made as a bargaining representative at a school board meeting, a federal district court has ruled that liability for a denial of civil rights based on first amendment protection could be established.

[39] Loya v. Desert Sands Unified School Dist., 721 F.2d 279 (9th Cir. 1983). *See* Connick v. Meyers, ____ U.S. ____, 103 S. Ct. 1684 (1983).

[40] King v. Iowa Civil Rights Comm'n, 334 N.W.2d 598 (Iowa 1983).

2.3 PROCEDURAL DUE PROCESS

2.3a Property Interest

The Fifth Circuit Court of Appeals has ruled that a Texas school superintendent had only a subjective and unilateral expectation of continued employment, which would not constitute a property interest worthy of constitutional protection. In seeking a contract extension, the superintendent had received an offer of employment, but no finalized written contract had been developed. The court refused to regard the school board's offer, coupled with the superintendent's willingness to accept the offer, as a binding agreement creating a legitimate expectancy of continued employment.[42]

No denial of property rights was recognized in what the Eighth Circuit Court of Appeals characterized as minor deviations from district regulatory policies that applied to a special evaluation committee's review of a probationary teacher. The committee appointed to review and make recommendations on the probationary teacher's continued employment held no formal meetings nor did they transmit formal recommendations to the school superintendent, although the committee did evaluate the teacher and provide input concerning the award of tenure.[43]

An acting superintendent who was replaced after a year's service and reassigned as a school principal sought reinstatement on the grounds that the school board failed to evaluate him under the terms of West Virginia's "employee" evaluation standards, and, as a consequence, he enjoyed a genuine entitlement to the position of superintendent on the presumption of satisfactory performance. In denying the plaintiff's claim, the state supreme court held that a superintendent is an officer elected by the local board and is *not* an "employee' in contemplation of statute law.[44]

The Seventh Circuit Court of Appeals refused to recognize a constitutionally protected property right in continued employment as a principal under the Illinois School Code. Although demoted at the end of the contract year from principal to teacher, the former principal retained his salary level. No code violation was recognized and no right to due process could be claimed.[45] In another case involving demotion, a Pennsylvania Department of Education employee, whose position was abolished in a reorganization and who was reassigned to new duties and later furloughed due to lack of work, was not considered to have been demoted as long as he retained his employment classification, previous salary, and benefits.[46]

---

[41] Pinsker v. Joint Dist. No. 28J, 554 F. Supp. 1049 (D. Colo. 1983).

[42] Cannon v. Beckville Indep. School Dist., 709 F.2d 9 (5th Cir. 1983).

[43] Derrickson v. Board of Educ. of St. Louis, 703 F.2d 309 (8th Cir. 1983).

[44] Lookabill v. Board of Educ., 304 S.E.2d 678 (W. Va. 1983).

An Illinois coach and athletic director was deprived of a legitimate expectation of continued employment when the school board refused to renew his contract for a second year. When the initial contract offer was made, it was established that the board informed the coach he would be extended a second annual contract at the end of the first year. The Seventh Circuit Court of Appeals ruled that this representation by the board created an implied contract for a two-year term, which constituted a property right to due process of law before any adverse employment decision could be effectuated by the board.[47]

A Michigan school board did not constructively discharge or demote a school principal by virtue of denying him salary increases for a two-year period. An appellate court concluded that while unequal pay might support a finding of constructive discharge (that is, employer's deliberate effort to make employee's working conditions so difficult as to be intolerable, forcing involuntary resignation), a difference in pay alone would not be sufficient to support constructive discharge.[48]

2.3b Liberty Interest

A junior high school teacher who was accused of touching a student's breast with a fork and touching the student on the buttocks was suspended with pay, pending a hearing on the charges before the school board. The teacher sought to establish that this suspension with pay for a period of a little over a week violated his liberty and property interests and created a claim for nominal and compensatory damages as a denial of due process. The Eleventh Circuit Court of Appeals held otherwise, finding that the teacher's property interest was too insubstantial to warrant due process protection inasmuch as he could allege only that he was deprived of the right to teach and coach for a week's time. As to the teacher's claim that the accusations were so stigmatizing as to deny a liberty interest, the court held that there was no allegation that school officials had been responsible for disseminating information on the charges to members of the community. Absent an allegation or proof the board published the charges against the teacher, the claim of a denial of liberty failed.[49]

---

[45] Lyznicki v. Board of Educ., 707 F.2d 949 (7th Cir. 1983).

[46] Silverman v. Commonwealth Dep't of Educ., 454 A.2d 185 (Pa. Commw. Ct. 1982).

[47] Vail v. Board of Educ. of Paris Union, 706 F.2d 1435 (7th Cir. 1983); Kanter v. Community Consol. School Dist., 558 F. Supp. 890 (Ill. 1982). In Illinois, a tenured public school teacher was held not to have a legitimate claim of entitlement to a merit salary increase, foreclosing any federal constitutional right to written standards defining merit or written reasons for denial of such an increase.

[48] LeGalley v. Bronson Commun. Schools, 339 N.W.2d 223 (Mich. Ct. App. 1983).

A New York school administrator, whose "at-will" status prohibited any claim to a property interest in continued employment, made out a claim for deprivation of liberty without due process and slander per se, which justified further proceedings to determine whether the stigmatizing statement made by board members was disseminated publicly. The statement made by the president of the board and the local superintendent accused the administrator of dishonesty and deceiving the board into believing he was a certified school business administrator.[50]

2.3c Aspects of Notice

Termination proceedings involving a teacher-coach were nullified due to a Nebraska school board's failure to provide adequate notice of the charges against the employee. The teacher's sole notice of charges was a letter, described in the Nebraska Supreme Court opinion as "vague and conclusory," which stated grounds for termination on the basis of neglect of duty and insubordination. Two days before the hearing the employee was given what later was established to be an incomplete list of witnesses against him. The court found neither of these actions were in compliance with minimum procedural due process.[51]

Under the statute laws of most jurisdictions, the failure of a school board to give notice of nonrenewal of a short-term, probationary, or supplemental contract will result in automatic renewal of the contract for an additional term. Two teachers who had been issued supplemental contracts to work as coaches did not receive notice of nonrenewal. The Ohio Supreme Court concluded that any teacher employed by the board of education to perform additional duties pursuant to a supplemental written contract is deemed reemployed unless the employing board of education gives such teacher written notice of its intention not to reemploy him to perform additional duties within the statutory deadline.[52]

---

[49] Hardiman v. Jefferson Cty. Bd. of Educ., 709 F.2d 635 (11th Cir. 1983).

[50] Supan v. Michelfeld, 468 N.Y.S.2d 384 (N.Y. App. Div. 1983). *See* Orshan v. Macciarola, 570 F. Supp. 620 (E.D.N.Y. 1983). An award of $30,000 resulting from noneconomic harm occasioned by the summary demotion of a high school principal to the rank and salary of an assistant principal has been upheld by a New York federal district court. The court sustained a jury determination that injury to career opportunities, reputation, and emotional well-being resulted from the demotion of the principal who had acquired tenure by estoppel in an earlier proceeding.

[51] Irwin v. Board of Educ., 340 N.W.2d 877 (Neb. 1983). *But see* Fleming v. Vance Cty. Bd. of Educ., 298 S.E.2d 733 (N.C. Ct. App. 1983). A North Carolina appeals court narrowly interpreted state statutory provisions requiring thirty days' notice of nonrenewal in favor of a school board that had given notice of nonrenewal to a probationary employee.

Failure to provide a director of pupil personnel proper statutory notification that he had been demoted to a position of classroom teacher created a cognizable claim against a school district for denial of due process. The school board did not properly act to provide timely notice of demotion prior to the statutorily mandated date of May 15.[53] Similarly, the failure to give an Oregon superintendent notice of nonrenewal on or before April 1 resulted in an award of a year's additional employment when an Oregon appellate court ruled the superintendent was an "administrator" within the meaning of the statute requiring notice.[54]

Connecticut statute law requires that before a board can terminate a teacher's contract it must provide written notification that such a termination is "under consideration." A nontenured part-time teacher was notified at the beginning of the school year that the defeat of a local school funding referendum would compel the elimination of her job. Since this notice was after the fact, the Connecticut Supreme Court sustained a lower court ruling that the notice was insufficient and untimely and granted a year's back pay for the school year.[55]

Failure to provide statutorily required written notice of findings and determination within ten days of a hearing at which the suspended Tennessee teacher was present did not deny due process or unfairly prejudice the teacher, nor would that failure justify nullification of the board's action. The Supreme Court of Tennessee ruled that actual notice, based on the teacher's presence at the hearing, was sufficient for due process protection.[56]

Substantial compliance with statutory notice of nonrenewal was recognized by the Supreme Court of Arkansas when the teacher was informed that the remedial reading program in which she instructed would not be continued in the next school year and no other position was available for her to fill. The teacher recognized that she would not be reemployed when she began applying to other districts for teaching positions.[57]

---

[52] Tate v. Westerville City Bd. of Educ., 448 N.E.2d 144 (Ohio 1983).

[53] Banks v. Board of Educ. of Letcher Cty., 648 S.W.2d 542 (Ky. Ct. App. 1983).

[54] Mitchell v. Board of Educ., 669 P.2d 356 (Or. Ct. App. 1983).

[55] Petrovich v. New Canaan Bd. of Educ., 457 A.2d 315 (Conn. 1983).

[56] Davis v. Barr, 646 S.W.2d 914 (Tenn. 1983).

A Delaware teacher's federal constitutional rights were not violated even though state statutory procedures for the conduct of terminations were not followed. The federal district court ruled that procedural protections offered the teacher did comply with federal due process standards despite deviation from state procedural guidelines.[58] And, in a case from New York, a teacher was estopped from contesting the timeliness of a notice of receipt of disciplinary charges against him when he acknowledged receipt of the charges and only later, after the time for service of notice had run out, contended that he had not received the charges.[59]

An Oregon teacher, who was dismissed for "gross unfitness" and "immorality" involving allegations he assaulted and battered a student, sought to establish that a notice of dismissal was inadequate because the notice recited only those facts that were contained in a civil action filed against the teacher. The Oregon appellate court held the notice informed the teacher of the charges against him with sufficient particularity to prepare his defense, since the connection between the alleged acts and teaching responsibilities could reasonably be inferred.[60]

2.3d Aspects of Hearing

An Oklahoma school superintendent was properly denied a hearing to contest the local board's decision not to renew his contract and was held to have no right to acquire tenure under Oklahoma statutes. The Oklahoma Supreme Court found no merit in an alternative contention that the local board's adopted evaluation policy created an implied contract provision that secured a reasonable expectancy of continued employment upon satisfactory performance evaluations. The court found no evidence in this instance that the board had contractually obligated itself to base a nonrenewal decision on employee evaluations.[61]

The Supreme Court of South Dakota has ruled that under state statute law, a nontenured probationary employee is not entitled to receive a list of reasons for nonrenewal, nor can the employee present

---

57. Lee v. Big Flat Pub. Schools, 658 S.W.2d 389 (Ark. 1983).

58. Brandywine Affiliate v. Board of Educ. of Brandywine School Dist., 555 F. Supp. 852 (D. Del. 1983).

59. Maida v. Ambach, 467 N.Y.S.2d 931 (N.Y. App. Div. 1983).

60. Shipley v. Salem School Dist., 669 P.2d 1172 (Or. Ct. App. 1983).

61. Board of Educ. v. Morris, 656 P.2d 258 (Okla. 1983).

witnesses at an informal conference provided by the local board on request of the employee.[62]

A Florida appeals court has ruled that no substantial interest compelling a due process hearing was involved in a teacher's transfer to another facility within the school district. Neither a property right to employment at a particular school nor any harm to reputation or pecuniary interests was established by the transferred teacher.[63]

Pennsylvania statutes do not entitle a temporary professional employee of a school district to a full evidentiary hearing prior to dismissal for unsatisfactory performance ratings.[64] Likewise, an Idaho probationary teacher's statutory right to notice and hearing on nonrenewal is satisfied when the school district board provides a statement of the reasons for nonrenewal and an opportunity for informal review by the board.[65]

2.4 DISMISSAL AND DISCIPLINE

The range of possible adverse employment decisions extends to many board actions in addition to dismissal. Demotion, denial of promotion or salary increment, reassignment, reprimand, or transfer can be alternatives to discipline the public school employee where authorized by state law. In general, however, the board's authority is most often challenged where dismissal of the employee is ordered.

2.4a Insubordination

A science teacher with nineteen years of experience was dismissed for insubordination under Mississippi statute law following several incidents in which he refused assignments involving supervision of students at a football game and during examinations on school grounds. The teacher contended it was error for the board to consider testimony as to the first instance of insubordination since it had never become a record in his personnel file and had taken place a year previous to the second instance. The Supreme Court of Mississippi held otherwise, noting that the admission of both instances were justified to

---

62. Coull v. Spearfish Bd. of Educ., 340 N.W.2d 695 (S.D. 1983).

63. Martin v. School Bd. of Gadsden Cty., 432 So. 2d 588 (Fla. Dist. Ct. App. 1983). *But see* Wood v. Independent School Dist. No. 141, 661 P.2d 892 (Okla. 1983). The Supreme Court of Oklahoma has held that a probationary teacher's interest in reemployment was sufficient to warrant an informal hearing before a school board, although with minimal procedural protection.

64. Husted v. Canton Area School Dist., 458 A.2d 1037 (Pa. Commw. Ct. 1983).

65. Webster v. Board of Trustees, 659 P.2d 96 (Idaho 1983).

establish a "constant or continuing intentional refusal to obey a direct or implied order."[66]

The Arkansas Supreme Court upheld a nonprobationary teacher's dismissal for destroying examination papers and failing to timely report lost or damaged books. School directives requiring teachers to retain final exams and report lost or damaged books were upheld as reasonable, particularly because the absence of final examinations made it more difficult to reconstruct several students' grades challenged by parents and failure to report the lost or damaged books resulted in additional mailing expenses of up to $300, which the school had to absorb.[67]

The actions of a high school principal were described as "errors of judgment" not warranting suspension in the view of the Supreme Court of Appeals of West Virginia. In the case, the principal had arranged for final term grades to be submitted prior to the final two class days of the school year, which resulted in a substantial decline in attendance for the final two days.[68]

A Louisiana appellate court has ruled that a teacher's failure to report for duty following a transfer directive of the school board was willful neglect of duty justifying dismissal. The teacher had sought to establish that the transfer was a "removal" that required formal due process protections under the state tenure law. The court held that a transfer did not constitute a removal when the teacher would have received a rank, salary, and status equivalent to that received in her previous position.[69]

Under Florida law, "gross insubordination or willful neglect of duty" would not be a proper basis for dismissal unless the school district could establish that the employee had received a direct order and failed to obey. In the specific case, a teacher demoted to annual contract status discussed his demotion with students, who then undertook petitions on behalf of the teacher.[70]

In the view of a Colorado appellate court, a tenured teacher's failure to follow his principal's postevaluation suggestions to improve teaching performance was appropriately a basis for dismissal on grounds of insubordination.[71] In a similar case from Missouri, a school board was justified in dismissing a tenured teacher who refused to teach a subject in which she had unilaterally withdrawn her certification. Budget cutbacks necessitated the teacher's reassignment from courses she was certified to teach.[72]

---

[66] Jackson v. Hazlehurst Mun. Sep. School Dist., 427 So. 2d 134 (Miss. 1983).

[67] Moffitt v. Batesville School Dist., 643 S.W.2d 557 (Ark. 1983).

[68] Totten v. Board of Educ. of Mingo Cty., 301 S.E.2d 846 (W. Va. 1983).

[69] Slaughter v. East Baton Rouge Parish School Bd., 432 So. 2d 905 (La. Ct. App. 1983).

[70] Rutan v. Pasco Cty. School Bd., 435 So. 2d 399 (Fla. Dist. Ct. App. 1983).

[71] Thompson v. Board of Educ., 668 P.2d 954 (Colo. Ct. App. 1983).

2.4b Unprofessional Conduct, Immorality, or Unfitness

Written complaints of sexual harassment submitted by at least ten children were sufficient to justify a school board's dismissal of an Indiana school bus driver. The hearing afforded the driver was sufficient to ensure procedural due process, even though the identity of the complainants was kept secret, where the board's investigation included steps to avoid collusion and the driver had the opportunity to refute the charges by other means. The court noted that the children were frightened of the bus driver and by the thought of having to recount that the driver had improperly touched them and attempted to lie on top of the children in the back of the school bus.[73]

A Pennsylvania tenured teacher was suspended for a year on charges that his conduct constituted sexual harassment. On appeal, a state court reversed the suspension on the ground that Pennsylvania statute did not authorize suspension after a dismissal proceeding in which two-thirds of the board members failed to vote for discharge.[74] However, a school custodian's dismissal for continually harassing a female teacher was justified as repeated acts of misconduct under New York law.[75]

Termination of a tenured Montana teacher was justified in consideration of poor performance. Evidence in the case, particularly classroom evaluations and testimony of parents and colleagues, tended to show the teacher was abusive and arbitrary with students and had frequent confrontations with parents and the school principal. Despite warnings and notices of deficiencies in evaluation reports, the teacher's behavior was considered unchanged.[76]

A Nebraska teacher who used the racial epithet "Dumb Niggers" to describe several black students in an integrated class was properly dismissed under a Nebraska statute that authorized cancellation of contract on grounds of immorality or insubordination.[77] In an analogous case, the use of loud, insolent, and abusive language toward faculty colleagues and other school personnel was a proper basis for the dismissal of an elementary art teacher in Massachusetts.[78]

---

72. McLaughlin v. Board of Educ., 659 S.W.2d 249 (Mo. Ct. App. 1983).

73. Green v. Board of School Comm'rs of Indianapolis, 716 F.2d 1191 (7th Cir. 1983).

74. Rike v. Commonwealth Secretary of Educ., 465 A.2d 720 (Pa. Commw. Ct. 1983).

75. Brais v. Board of Educ. of Massena, 460 N.Y.S.2d 387 (N.Y. App. Div. 1983).

76. Donnes v. Montana, 672 P.2d 617 (Mont. 1983).

77. Clarke v. Board of Educ. of Omaha, 338 N.W.2d 272 (Neb. 1983).

78. Kurlander v. School Comm. of Williamstown, 451 N.E.2d 138 (Mass. App. Ct. 1983).

The dismissal of a noninstructional employee of a Florida school board was upheld on evidence establishing that the employee had made disparaging racial remarks about his supervisor to other employees. A Florida appellate court concluded that the school board's interest in promoting efficiency of service justified dismissal for failure to show proper respect for the authority of supervising personnel and outweighed any claim of an employee's right to speak on a matter of no public concern.[79]

It was neither arbitrary nor capricious for an Arizona school board to dismiss a teacher for failure to cooperate in an investigation into his relationship with a seventeen-year-old high school student that eventually led to marriage between teacher and student.[80]

An Ohio school board was held to have acted properly in authorizing a written reprimand to a teacher who utilized class time to discuss personal views and experiences unrelated to subject matter and in granting the teacher the right to participate in a review of her personnel file and include a rebuttal of information she disputed in the file.[81]

Under Oklahoma standards, a nontenured teacher was not entitled to reinstatement where dismissal was predicated on instances of repeated tardiness and the procedural due process right to notice and hearing before termination was granted by the local board.[82] A hearing panel's decision to dismiss a tenured teacher who was absent from teaching duties without authorization over a three-month period was upheld as reasonable by a New York appellate court.[83]

A Florida principal's dismissal was overturned when the appellate court concluded that school board findings were insufficient to comply with the provisions of the Florida Administrative Procedures Act. Under the provisions of the law, a state hearing officer was required to make specific findings of fact on issues as to whether the improper use of school funds was mitigated by the principal's alleged intention to reimburse. It was considered harmful error for the officer to fail to rule on the proposed findings.[84]

Dismissal was held an excessive penalty for misconduct involving a New York school district's superintendent of buildings and grounds. The New York appeals court ruled that in view of the administrator's excellent record and absence of moral turpitude, it was unreasonable to dismiss for misconduct connected with exceeding a budget appropriation in the absence of authorization and paying one individual for painting work done by another.[85]

---

[79] Jacker v. School Bd. of Dade Cty., 426 So. 2d 1149 (Fla. Dist. Ct. App. 1983).

[80] Welch v. Board of Educ. of Chandler, 667 P.2d 746 (Ariz. Ct. App. 1983).

[81] Petrie v. Forest Hills School Dist., 449 N.E.2d 786 (Ohio Ct. App. 1982).

[82] Winslett v. Independent School Dist. No. 16, 657 P.2d 1208 (Okla. Ct. App. 1982).

[83] Kuhle v. Ambach, 457 N.Y.S.2d 1013 (N.Y. App. Div. 1982).

[84] Pelham v. Whaley, 436 So. 2d 951 (Fla. Dist. Ct. App. 1983).

Evidence of habitual or excessive use of alcohol was not sufficient to justify dismissal of a "career teacher" in a case from North Carolina. Examination of the record indicated that the only evidence of alcohol use over a two-year period was testimony from four different people who had smelled what they believed to be alcohol on plaintiff's person.[86]

An Oregon appellate court upheld a finding of the state's Fair Dismissal Appeals Board that incidents of alleged corporal punishment imposed by a teacher on students did not justify dismissal. The court found no pattern of improper use of corporal punishment in four isolated instances of interactions between teacher and students, nor was there evidence that the students sustained injury or the teacher's actions were intended to harm.[87]

A tenured elementary teacher was dismissed by an Illinois school board for excessive use of force in administering punishment and for permitting students to leave the classroom without supervisory or parental prior approval. On appeal, an Illinois appellate court reinstated the teacher, agreeing with a hearing officer's determination that the teacher's conduct was remediable and that a warning to the teacher should have been provided by school superiors.[88]

A tenured physical education teacher in Illinois won reinstatement when he successfully argued that improper use of paid and sick leave for the purpose of engaging in a part-time coaching job was a remediable deficiency that required notice and an opportunity to correct the behavior before dismissal would be warranted.[89]

An Ohio wrestling coach and guidance counselor was found to have encouraged a student wrestler to lie, in order that another team member might wrestle in the student's class. After he admitted this indiscretion and resigned his coaching position, the school board properly terminated the employee's contract as counselor.[90]

A security officer at a state school for the deaf was properly discharged for abusing an eighteen-year-old student, based on evidence that the officer angrily and physically coerced the student into cleaning spittle off the officer's vehicle. The officer's use of force resulted in the

---

85. Stevenson v. Spencerport Cent. School Dist., 468 N.Y.S.2d 763 (N.Y. App. Div. 1983).

86. Faulkner v. New Bern-Craven Cty. Bd. of Educ., 309 S.E.2d 548 (N.C. Ct. App. 1983).

87. Bethel School Dist. v. Skeen, 663 P.2d 781 (Or. Ct. App. 1983).

88. Board of Educ. of School Dist. No. 131 v. Illinois State Bd. of Educ., 445 N.E.2d 832 (Ill. App. Ct. 1983).

89. Szabo v. Board of Educ., 454 N.E.2d 39 (Ill. App. Ct. 1983).

90. Florian v. Highland Local School Dist., 570 F. Supp. 1358 (E.D. Ohio 1983).

student's suffering contusions, bleeding, and loss of a patch of hair, justifying the view that the officer had exceeded an arguable right to use reasonable force.[91]

A California school district's involvement in placing an undercover investigator in a classroom as part of a police investigation into allegations that a teacher was engaged in purchasing and receiving stolen goods would not bar the district, under principles of equitable estoppel, from seeking the teacher's dismissal based on conduct revealed by the investigation.[92]

Suspension of a teacher following indictment for possession with intent to distribute cocaine was justified within the meaning of misconduct "in office or employment" under Massachusetts statute law. The Massachusetts appellate court held that suspension was proper even though the indictment was based on the teacher's off-duty conduct.[93]

2.4c Incompetency and Persistent Negligence

A school guidance counselor was justifiably dismissed from his position for failing to register seniors in his classes required for graduation and failing to inform parents of students who were having academic difficulties. The counselor had been specifically instructed to undertake these assignments and lied to the school principal when asked if he was meeting the directives. In a ruling by the Nebraska Supreme Court, the school board's decision to dismiss the counselor for neglect of duty and unprofessional conduct was affirmed.[94]

A dismissal for "persistent negligence" was upheld by a Pennsylvania appellate court upon a showing that the school principal repeatedly failed to submit instructional requisitions for educational materials and complete textbook reviews within reasonable time frames.[95] A New York appellate court has upheld an administrative determination that suspension without pay for one year was justified for insubordination and failure to maintain class discipline and keep proper records.[96]

Evidence of incompetence and willful neglect of duty were sufficient to justify a Georgia principal's termination. Despite some conflict in the evidentiary record, the Georgia Supreme Court sustained dismissal as justified under either ground and refused to consider a claim by the principal that statutes governing dismissal were unnecessarily vague and untimely raised.[97]

---

[91] Swingle v. State Employees' Appeal Comm'n, 452 N.E.2d 178 (Ind. Ct. App. 1983).

[92] Pittsburg Unified School Dist. v. Commission on Professional Competence, 194 Cal. Rptr. 672 (Cal. Ct. App. 1983).

[93] Dupree v. School Comm. of Boston, 446 N.E.2d 1099 (Mass. App. Ct. 1983).

[94] Bickford v. Board of Educ., 336 N.W.2d 73 (Neb. 1983).

[95] Crossland v. Bensalem Twp. School Dist., 464 A.2d 632 (Pa. Commw. Ct. 1983).

[96] Piazza v. Ambach, 460 N.Y.S.2d 198 (N.Y. App. Div. 1983).

California statutory provisions on evaluation and notice of incompetency were complied with when a school district provided timely notice of specific deficiencies and included recommendations as to areas of improvement along with a written notice that the teacher's performance was unsatisfactory.[98]

Testimony by a psychiatrist and a clinical psychologist supported a school board's determination that the teacher suffered from a serious personality disorder justifying dismissal because of the potentially negative impact on children in his fourth-grade classroom.[99]

A high school Spanish teacher was properly dismissed for incompetency after being warned of performance deficiencies and given an opportunity to remediate when it was established that he failed to achieve performance objectives in teaching Spanish and failed to maintain proper control of assigned students.[100]

Nonrenewal of a South Dakota principal-teacher was supported by substantial evidence concerning lack of discipline in the school. The record indicated that numerous student and parent complaints, specifying instances in which the principal had failed to maintain proper control of students, were corroborated by onsite visits to the school by board members.[101]

Although a South Dakota school board failed to meet its own policy standards for evaluation of a probationary teacher, the Supreme Court of South Dakota sustained a nonrenewal decision based on the school board's substantial compliance with notice of deficiencies that provided the teacher with sufficient time to improve her teaching performance. Though the board had not conducted all statutorily mandated evaluations, those evaluations that had been conducted established deficiencies requiring remediation, and the court concluded the failure to complete all evaluations did not impair the teacher's ability to make improvements.[102]

Substantial evidence supported a school board's finding of neglect of duty and incompetence justifying a teacher's dismissal, and a trial court's reevaluation of evidence and subsequent order for teacher reinstatement was reversed by an Indiana appeals court. The principal's evaluations of teaching performance confirmed allegations of lack of ability to maintain discipline, to follow administrative direction, and to properly teach students to prepare them for higher grade education.[103]

---

[97] Sharpley v. Hall Cty. Bd. of Educ., 303 S.E.2d 9 (Ga. 1983).

[98] California Teachers Ass'n v. Governing Bd. of Livingston Union School Dist., 192 Cal. Rptr. 358 (Cal. Ct. App. 1983).

[99] Fitzpatrick v. Board of Educ., 465 N.Y.S.2d 240 (N.Y. Sup. Ct. 1983).

[100] Perez v. Commission on Professional Competence, 197 Cal. Rptr. 370 (Cal. Ct. App. 1983).

[101] Jones v. Sully Buttes Schools, 340 N.W.2d 697 (S.D. 1983).

[102] Schaub v. Chamberlain Bd. of Educ., 339 N.W.2d 307 (S.D. 1983).

In applying the standard of preponderance of the evidence, an Iowa appeals court ruled that a school board failed to show that the record justified a teacher's dismissal for insubordination or incompetence related to allegations of failure to maintain classroom discipline, utilize adequate teaching methods, or relate to students.[104] In contrast, evidence of a teacher's use of sarcasm and ridicule with students and lack of rapport with parents justified a finding of cause for contract termination in another Iowa appellate decision.[105]

A North Carolina appeals court found substantial evidence of unsatisfactory teaching performance to justify placing a teacher on conditional status and to sustain the decision of the school board to dismiss the teacher. In addition to parental complaints of poor teaching, two principals' evaluations of the teacher's performance in two separate years indicated unsatisfactory ratings.[106]

A Pennsylvania appellate court remanded a dismissal case to the Pennsylvania Secretary of Education for a determination as to which of several teacher evaluation ratings should be used to determine whether a tenured second-grade teacher could be terminated. Pennsylvania requires that dismissal for incompetency be based on a minimum of two consecutive unsatisfactory ratings but the court was unable to discern which ratings were relied on by the district or the secretary in reaching the employment decision.[107]

Dismissal of a Colorado teacher for incompetency and neglect of duty was upheld by the Colorado Supreme Court after a hearing officer completed an opinion involving twenty-four findings of fact, supported by hearsay as well as direct evidence, of the teacher's incompetence.[108]

A Pennsylvania school board's decision to dismiss a temporary professional employee was justified when based on classroom ratings of the teacher's performance and the testimony of the school principal and district superintendent confirming the observation ratings. No evidence was presented indicating that the unsatisfactory rating was arbitrary or procedurally defective, and the consequent discharge was upheld by a Pennsylvania appellate court.[109]

---

[103] Harrison-Washington Commun. School Corp. v. Bales, 450 N.E.2d 559 (Ind. Ct. App. 1983).

[104] Board of Dirs. of South Winneshiek v. Sexton, 334 N.W.2d 341 (Iowa Ct. App. 1983).

[105] Everett v. Board of Educ. of Hampton, 334 N.W.2d 320 (Iowa Ct. App. 1983).

[106] Davidson v. Winston-Salem/Forsyth Cty. Bd. of Educ., 303 S.E.2d 202 (N.C. Ct. App. 1983).

[107] Hamburg v. Commissioner, Dep't of Educ., 458 A.2d 288 (Pa. Commw. Ct. 1983).

[108] Benke v. Neenan, 658 P.2d 860 (Colo. 1983).

2.5 REDUCTION IN FORCE AND ABOLITION OF POSITION

2.5a Necessity for Reduction in Force

An Iowa Supreme Court decision sustained the propriety of a school superintendent's actions in effectuating a reduction in force (RIF). The superintendent established that severe budgetary imbalances were first addressed through natural attrition of staff, followed by efforts to renegotiate terms of the master contract. Once these efforts proved inadequate, the selection of the teacher to be laid off was influenced by certification and seniority, with the teacher selected having less mobility in terms of reassignment within the district.[110]

Under Illinois law, hearings are required when economic necessity compels dismissal of more than five tenured teachers within a district. In an Illinois appellate court decision a school board that had issued honorable dismissals to fifty-nine teachers could not moot a class action challenge to the reduction in force by stipulating that all but five of the tenured teachers who received dismissal notices were rehired or declined offers of reemployment. The court found that the right to hearings on the necessity for a RIF crystallized at the time of notice of dismissal, though hearings would extend only to those tenured teachers who were not offered reemployment.[111]

A federal district court has held that a former school dietitian received appropriate due process when she was given notice of termination due to a reduction in force and was permitted an opportunity for appeal. Although the employee's contract specified termination only for cause, the court found that the bona fide condition of financial exigency did exist in the school district and such a condition constituted "cause."[112]

---

[109] Kudasik v. Board of Dirs., 455 A.2d 261 (Pa. Commw. Ct. 1983).

[110] Smith v. Board of Educ. of Mediapolis, 334 N.W.2d 150 (Iowa 1983). *See also* Olds v. Board of Educ., Nashua Commun. School Dist., 334 N.W.2d 765 (Iowa Ct. App. 1983) (seniority as stipulated in the master contract would be a determining factor in layoffs).

[111] Wheatley v. Board of Educ., 446 N.E.2d 1257 (Ill. App. Ct. 1983).

[112] Barry v. Blue Springs R-IX School Dist., 557 F. Supp. 249 (W.D. Mo. 1983). *See* San Jose Teachers Ass'n v. Allen, 192 Cal. Rptr. 710 (Cal. Ct. App. 1983). A school district's financial circumstances would be a legitimate consideration in any decision to reduce or discontinue school services, including the reduction of classroom teaching.

2.5b Elimination of Position

A school board, having determined that, due to declining enrollment, the number of social studies positions should be reduced and one teaching position eliminated, was challenged in its decision by the social studies teacher whose position was eliminated. The New York appellate court found for the school board, concluding that the administrative hearing panel had exceeded its authority by insisting that the board justify its decision to eliminate a position in social studies rather than in the English program. The board made its determination of the position to be eliminated on the basis of state-required curriculum mandates and courses desired by parents and students and demonstrated that reshuffling of schedules so as to retain a particular teacher was impossible. Thus, no further justification was required, provided, as in this instance, the board exercised its discretion reasonably without evidence of arbitrary or capricious conduct.[113]

Under provisions of most reduction in force policies, whether collectively negotiated or mandated by state law, it is generally held to be impermissible to nonrenew a tenured teacher while retaining a nontenured teacher in a position for which the tenured teacher is equally qualified. A Kansas school board, responding to past and projected enrollment declines, undertook a reduction in force in which a tenured high school English teacher in the language arts program was excessed. All junior high school positions in English were removed from consideration by the board, although the excessed teacher alleged the board had acted arbitrarily and capriciously in identifying the position to be eliminated and selecting the employee to be excessed. The reviewing courts agreed that the school board's decision distinguishing categories of "language arts" specializations in high school and junior high was arbitrary. The court found the categories of specialization unrecognized under school board policy, certification, or state law requirements and went further to hold that the excessed teacher was well qualified to assume a position as a junior high school English teacher. Having found the board's action arbitrary and capricious, the court concluded the reduction in force was violative of the Kansas tenure statute insofar as several probationary teachers at the junior high school level had been rehired while the senior high English teacher had not been renewed.[114]

Although Iowa courts recognize that a reduction in force is not an occasion for determination of good cause for dismissal, the Iowa

---

[113] Rappold v. Board of Educ., Cleveland Hills, 464 N.Y.S.2d 240 (N.Y. App. Div. 1983).

[114] Coats v. Board of Educ., 662 P.2d 1279 (Kan. 1983).

Supreme Court has compelled a local district to provide a hearing on how it chose specific positions for elimination, in order to avoid the possibility that a principal's layoff was related to an attempt by the board to punish for the exercise of constitutional rights or was otherwise arbitrary and capricious.[115]

2.5c Selection of Employee

A California school board, faced with the necessity of a reduction in force, sought to selectively retain teachers having Spanish-speaking skills. As a result, teachers who claimed greater district seniority challenged the board's layoff decision as violative of statute specifying that less senior teachers can be retained only where certified and competent to render special services. The board's rationale for retaining Spanish-speaking teachers, even though these teachers did not teach bilingual education classes, was related to the large proportion of Spanish-speaking students in the district. The appellate state court found that retention of less senior employees must be predicated on program requirements and not on a loosely constructed notion of "needs" identified by the district.[116]

No constitutionally protected property interest could be established by an Arkansas certified teacher whose contract was not renewed due to a reduction in force. The federal district court concluded that a full remedy was available under Arkansas statutes for any allegation of arbitrary and capricious action in the school board's determination of the proper employee to be laid off.[117]

Good cause dismissal provisions of Ohio law, which would grant substantial due process protection in dismissals relating to teacher conduct, do not apply when the course in which a teacher is certified is eliminated from the curriculum and another course in which the teacher is not certified is adopted.[118]

Notice of nonrenewal based on program discontinuance was upheld when it was established that an Oklahoma occupation services teacher was advised by certified letter of his nonrenewal and his right to a hearing. The local board's discretion in determining the program to be eliminated and the employee to be laid off was affirmed by the state appellate court.[119]

---

[115] *In re* Waterloo Commun. School Dist., 338 N.W.2d 153 (Iowa 1983).

[116] Alexander v. Delano Joint Union High School Dist., 188 Cal. Rptr. 705 (Cal. Ct. App. 1983).

[117] Sutton v. Mariana School Dist., 573 F. Supp. 159 (D. Ark. 1983).

[118] State *ex rel.* Cutler v. Pike Cty. Joint Area Voc. School, 451 N.E.2d 800 (Ohio 1983).

[119] Weeks v. Northeast Oklahoma Area Voc.-Tech. School, 657 P.2d 1205 (Okla. Ct. App. 1982).

2.5d Seniority and Reassignment

Under New Jersey law a reduction in hours of employment, from full- to part-time, is a reduction in force if done for reasons of economy. However, a school board's discretion in reducing a tenured teacher's employment, along with an equal reduction for a nontenured teacher, did not violate tenure and seniority rights because the board's action was predicated on reasons of economy and the tenured teacher was not treated as the inferior of the nontenured teacher.[120]

New Jersey regulations governing seniority in appointment practices have been interpreted to permit a tenured part-time teaching staff member with proper certification to claim seniority in seeking a full-time appointment that is within the certification area and involves responsibilities identical to those of the part-time position actually held. In applying the regulations, the New Jersey Supreme Court ruled that a tenured teacher who was employed as a part-time librarian could claim seniority preference over a nontenured teacher for appointment as full-time librarian.[121]

New York subject area coordinators were subject to independent determinations as to whether or not they possessed tenure, and sufficient seniority, to protect their employment status in an economically compelled reduction in force.[122] A New York appeals court reinstated a laid-off teacher where it was established that the teacher's seniority and tenure in the area of trade electricity were superior to those of a teacher who was hired to teach appliance repair.[123] However, under New York law, library positions are not "similar" for purposes of preferences in hiring where the abolished position involved teaching responsibilities and required a teaching certificate and the newly created position had no such certification requirement.[124]

Under New York law, a position as a regular substitute is a "vacancy," which should be filled by the most senior teacher on a preferred eligibility list, particularly when it is clear that the one-year substitute position would become a full-time regular position within a year due to the poor health of the incumbent teacher.[125]

---

[120] Klinger v. Board of Educ. of Cranbury, 463 A.2d 948 (N.J. Super. Ct. App. Div. 1983).

[121] Lichtman v. Board of Educ., 461 A.2d 158 (N.J. 1983).

[122] Maine-Endwell Teachers Ass'n v. Maine-Endwell Cent. School Dist., 461 N.Y.S.2d 537 (N.Y. Sup. Ct. 1983). *See also* Forgarty v. School Comm. of Palmer, 448 N.E.2d 783 (Mass. App. Ct. 1983). Department head is a "supervisor" for purposes of statute applicable to demotion of tenured supervisors.

[123] Nusz v. Board of Coop. Educ. Servs., 459 N.Y.S.2d 889 (N.Y. App. Div. 1983).

[124] Smith v. Board of Educ. of East Ramapo, 468 N.Y.S.2d 539 (N.Y. App. Div. 1983).

[125] Dionisio v. Mahopac Cent. School Dist., 466 N.Y.S.2d 450 (N.Y. App. Div. 1983). *But see* Taylor v. Board of Trustees, Del Norte Unified School Dist., 196 Cal. Rptr. 444 (Cal. Ct. App. 1983). No reemployment preference would apply to California substitute teachers hired to replace a regular teacher on leave of absence.

New York law restricts the award of cumulative seniority where an appointment as a substitute teacher was improper. Thus, a school board could not include any seniority credit to a substitute teacher for services performed under an improper appointment.[126] However, a New York school board was held to have unreasonably and arbitrarily applied its procedure for determining seniority among tenured faculty when it refused to recognize a teacher's years of service because the teacher had never received a formal notice of appointment.[127]

An honorably dismissed Illinois teacher could not compel a realignment of teaching positions that would combine classes from two positions, creating a single position for which the teacher could qualify. In a decision by the Supreme Court of Illinois, the school district was held not to have acted arbitrarily or capriciously by refusing to combine classes and rehire the teacher. Central to the court's determination was a finding that the teacher could not legally qualify for either of the newly created positions.[128]

The Supreme Court of Ohio has recently construed statutory provisions stipulating that seniority of service should guide the preference of the school board in reductions in force based on declining enrollment. The court has held that the statutory reduction in force does not apply when a decline in enrollment within a particular course of study necessitates the transfer of a more senior teacher from that field. No decline in the actual number of teachers resulted when a senior teacher in an occupational education program was transferred to a position as a study hall teacher due to declines in the occupational program's student enrollment. Consequently, the teacher's reliance on the statute to compel reassignment of a less senior teacher was misplaced.[129]

While a Florida school district could properly abolish a position for economic reasons, it had a duty to determine whether another position was available for which the employee was qualified. The employee, hired as a cafeteria worker, was certified to teach, but no board inquiry was made with respect to employing the worker in a teaching position.[130]

Reassignment to a teaching position from an administrative role, absent any reduction in salary, was justified on the basis of legitimate financial constraints and did not circumvent Montana tenure laws despite the dissimilar functions inherent in moving from an administrative to a teaching position. The Montana Supreme Court, while noting that the positions were functionally dissimilar, concluded that positions as a coordinator of intermediate education and classroom teacher were comparable for acquisition of tenure and were not contrary to the intent of the tenure statute.[131]

---

[126] Daul v. Board of Educ. of Mahopac, 466 N.Y.S.2d 449 (N.Y. App. Div. 1983).

[127] Schoenfeld v. Board of Coop. Educ. Servs., 469 N.Y.S.2d 133 (N.Y. App. Div. 1983).

[128] Peters v. Board of Educ. of Rantoul Twp., 454 N.E.2d 310 (Ill. 1983).

[129] Bohmann v. Board of Educ. of West Clermont, 443 N.E.2d 176 (Ohio 1983).

[130] Bass v. Gilchrist Cty. School Bd., 438 So. 2d 100 (Fla. Dist. Ct. App. 1983).

Reassignment as principal of a kindergarten through sixth grade from that of a principal in kindergarten through eighth grade complied with a New York statute requirement specifying placement in a "similar" position provided the employee received no reduction in salary or increment.[132]

Under a California appellate court ruling, school districts are not required to obtain a certified employee's consent to an assignment in a continuation high school even though the teacher's certification was a general secondary credential.[133]

2.6 CONTRACTUAL DISPUTES

2.6a Contractual Provisions and Board Policies

An Idaho teacher who taught six rather than the normal five class periods was entitled to a salary increment equal to 10 percent of his base salary based on a minimum standards policy adopted by the school district in 1973. The school district contended the minimum standard did not apply to the contract negotiated with the teacher in 1978, but the board introduced no substantial evidence that would reflect a different minimum standard.[134]

An Ohio teacher was granted the differential between her existing salary and the salary set forth on a newly adopted local salary schedule based on an Ohio Supreme Court's ruling that the teacher was entitled to full credit for up to five years of previous teaching service.[135] However, an Ohio board of education may establish its own service requirements for full credit on a locally adopted salary schedule as long as the teacher is given full credit for the statutory minimum of five years prior actual teaching experience.[136]

---

[131] Sorlie v. School Dist. No. 2, 667 P.2d 400 (Mont. 1983).

[132] Rossi v. Board of Educ. of City School Dist., 465 N.Y.S.2d 630 (N.Y. Sup. Ct. 1983).

[133] California Teachers' Ass'n v. Governing Bd. of Cent. Union High School Dist., 190 Cal. Rptr. 453 (Cal. Ct. App. 1983).

[134] Robinson v. Joint School Dist., 670 P.2d 894 (Idaho 1983).

[135] Rauhaus v. Buckeye Local School Dist. No. 331, 453 N.E.2d 624 (Ohio 1983).

[136] Maple Heights Teachers' Ass'n v. Maple Heights Bd. of Educ., 453 N.E.2d 619 (Ohio 1983). *See also* Crawford v. Board of Educ., 453 N.E.2d 627 (Ohio 1983). A substitute teacher who teaches in an Ohio school district for more than 120 days in a school year is entitled to a year of service credit in computing later salary awards.

A New York school district was not entitled to deduct salary received by a suspended teacher during the period of his suspension if it could be established that those earnings were supplemental rather than substitute earnings for service in the school district.[137]

A Pennsylvania teacher, properly dismissed for incompetence, was entitled to back pay during a medical absence that occurred prior to contract termination. Though he was absent for medical reasons up until the time of his dismissal, the appellate court found no intention to abandon his contract or terminate the contract agreement through a mutual rescission.[138]

A contract modification in which the employee agreed to go on sick leave until he could furnish proof of recovery from an emotional disturbance, in exchange for the superintendent's promise to withhold a notice of termination, was upheld by the Iowa Supreme Court despite the failure to ratify, which would have been evinced by the signature of the school board president.[139]

A provision of a state statute and an employee contract that referred to "other duties" in an Iowa principal's employment could extend to assignment as an attendance officer under a construction recognized by the Iowa Supreme Court. The court found no breach of contract in the school board's assignment and ruled the board's action did not exceed its discretionary authority.[140]

2.6b Administrative Regulations and State Statutory Provisions

State law frequently makes provision for differential pay, equal to the teacher's salary minus the salary of a substitute, when a teacher is absent for administratively approved or other justifiable reason. The Oklahoma Supreme Court has ruled that a school district may properly deduct the differential even when no substitute is actually hired.[141] In a California appellate court decision, it has been ruled that the entitlement to the pay differential is a separate entitlement in each school year.[142]

---

[137] Hawley v. South Orangetown Cent. School Dist., 469 N.Y.S.2d 457 (N.Y. App. Div. 1983).

[138] Bruckner v. Lancaster Cty. Area Voc.-Tech., 467 A.2d 432 (Pa. Commw. Ct. 1983).

[139] Smith v. Fort Madison Commun. School Dist., 334 N.W.2d 701 (Iowa 1983).

[140] Gere v. Council Bluffs Commun. School Dist., 334 N.W.2d 307 (Iowa 1983). Thomas v. Board of Educ., 453 N.E.2d 150 (Ill. App. Ct. 1983). An Illinois school board may reasonably require teachers to submit typed master copies of their examinations for approval and duplication.

[141] Earnest v. School Bd. of Indep. Dist. No. 16, 666 P.2d 1287 (Okla. 1983).

[142] California Teachers' Ass'n v. Governing Bd. of Gustine, 193 Cal. Rptr. 650 (Cal. Ct. App. 1983).

In adopting guidelines for salary increments based on education credit for professional improvement, the Louisiana Educational Employees Professional Improvement Committee exceeded its authority by establishing standards that were more stringent than those contained in the state statutory provision.[143]

Contract cancellation of a permanent teacher under an indefinite contract, which occurred between terms during the summer, would not become effective until the end of the following academic year term under Indiana law. A school district's claim that the state statute was intended to apply only to contract cancellations during the progress of the school year was denied by an Indiana appeals court.[144]

A probationary teacher who sought reinstatement and an award of attorney's fees was not successful in establishing a violation of the Oregon teacher's evaluation statute. Though the teacher received no evaluation of her performance consistent with the statutory requirements, an Oregon appellate court held the district had no obligation to evaluate the teacher under the statute as the statute was not incorporated by reference into the employment contract.[145]

Despite the school district's failure to properly serve notices of nonrenewal as required by a negotiated contract, the Kansas Supreme Court upheld the propriety of nonrenewal notices where the notices were served on or before the April 15 date specified under Kansas continuing contract statute. The negotiated contract provision was void as in conflict with the statutory notice requirement.[146]

An Indiana school board had the requisite authority to hire a teacher as a "permanent substitute" and was not required to hire her as a temporary teacher under Indiana statute law, despite a statutory wording that specified that a "temporary teacher's contract shall be used only for employing a teacher." In this instance, the appellate court ruled that the word "shall" was a term of limitation, not of mandate.[147]

California makes statutory provision for automatic resignation when an employee is absent without leave for five consecutive working days. In confining this statute to cases in which the absence is admitted, a California appeals court noted that it would be a denial of due process to permit the statutory presumption where an employee presented a factual dispute regarding authority for the absence.[148]

---

[143] Deshotels v. State Professional Improvement Comm., 430 So. 2d 1198 (La. Ct. App. 1983).

[144] Blue River Valley School Corp. v. Renfro, 446 N.E.2d 1364 (Ind. Ct. App. 1983).

[145] Smith v. School Dist. No. 45, 666 P.2d 1345 (Or. Ct. App. 1983).

[146] Ottawa Educ. Ass'n v. Unified School Dist. No. 290, 666 P.2d 680 (Kan. 1983).

[147] Paul v. Metropolitan School Dist., 455 N.E.2d 411 (Ind. Ct. App. 1983).

[148] Zike v. State Personnel Bd., 193 Cal. Rptr. 766 (Cal. Ct. App. 1983).

1

A California appellate court has resolved an apparent conflict in statutory provisions by concluding that a substitute teacher hired to replace a certified employee on leave has no right to reemployment preference when a regular teacher leaves the district.[149]

2.7 TENURE

2.7a Probationary Period

An Iowa teacher could not claim tenure by virtue of fulfilling statutory requirements for the probationary period while employed as a part-time tutor for a single student. The teacher was terminated following a reduction in force, but sought additional due process protection based on a claim that she had fulfilled the probationary period and possessed tenure rights. The court did not recognize her employment as qualifying her for statutory tenure rights and sustained the school board's determination not to process her notice of appeal of termination.[150]

The Idaho Supreme Court has held that a first-year probationary teacher has no right to a second year of probationary employment simply because nonrenewal was related to performance-based deficiencies in relationships with students and lack of classroom control.[151] Similarly, a Nebraska probationary teacher is not entitled to those termination and rehiring benefits enjoyed by tenured teachers and may not assert a preferred right to reemployment.[152]

A Massachusetts teacher who met the tenure requirement for three consecutive years of probationary employment was reemployed on a full-time basis in November of the following year. The Supreme Judicial Court of Massachusetts ruled that, having met the requirement of three consecutive years of employment, the rehiring in November satisfied the statutory requirement for award of tenure.[153]

The New York Court of Appeals has upheld an interpretation by the commissioner of education that would allow credit toward tenure for satisfactory substitute service where such service was rendered prior to the commencement of the first of a statutorily mandated three years of probationary service.[154]

---

[149] Taylor, *supra* note 125.

[150] Stafford v. Valley Commun. School Dist., 328 N.W.2d 323 (Iowa 1983).

[151] Knudson v. Boundary Cty. School Dist., 656 P.2d 753 (Idaho 1983).

[152] Roth v. School Dist. of Scottsbluff, 330 N.W.2d 488 (Neb. 1983).

[153] Ripley v. School Comm. of Norwood, 451 N.E.2d 721 (Mass. 1983).

[154] Robins v. Blaney, 465 N.Y.S.2d 868 (N.Y. 1983).

2.7b Tenure by Default or Acquiescence

A school district's business manager successfully established that her position came within the protection of a South Dakota statute granting continuing contract status to "other administrative employees." As a consequence, the employee could claim that the district's failure to provide adequate notice of termination constituted a renewal of her contract.[155]

A New York guidance counselor successfully contested a school district decision to nonrenew by arguing that her employment was in a probationary tenure-earning status rather than a half-time substitute. A New York appellate court awarded reinstatement and back pay on the grounds that the counselor had achieved tenure by estoppel following two years of probationary service.[156]

A school board's failure to notify the state tenure commission that the board intended to place a probationary teacher on a third year of probationary status resulted in the teacher's receipt of tenured status at the end of his second year of employment, despite board notice to the contrary.[157]

A Montana school psychologist was held to have earned tenure under a construction of the teacher tenure law prior to the amendment to the statute that excludes tenure-earning status for school psychologists. Additional evidence of the school district's intent to utilize the employee in a manner consistent with tenure status was a requirement within the employment contract that the psychologist hold a valid teacher certificate rather than a specialist certificate.[158]

A guidance counselor employed under a federal grant at a career development center did not acquire tenure prior to the time her position was abolished due to program termination, because she did not serve within the New York school system.[159] In another New York case, an acting principal could not acquire tenure by estoppel by arguing that her termination on the final day of her two-year probationary period was not in compliance with New York statutory standards.[160]

Teachers who were given adequate notice of the nontenured status of positions as occupational education instructors in a daytime adult learning program were held to have waived any claim to tenure and could be terminated for budgetary reasons. Adequacy of notice was implied from a letter the teacher received, which did not contain a clause specifying that the position was tenure earning.[161]

---

[155] Weltz v. Board of Educ. of Scotland, 329 N.W.2d 131 (S.D. 1983).

[156] Sapphire v. Board of Educ., 466 N.Y.S.2d 439 (N.Y. App. Div. 1983).

[157] Davis v. Board of Educ. of Harrison Commun. School, 342 N.W.2d 528 (Mich. Ct. App. 1983). *See* Slocum v. Littlefield Pub. Schools, 338 N.W.2d 907 (Mich. Ct. App. 1983). Letter sent to State Tenure Commission met required notice of teacher's third-year probationary status.

[158] Harris v. Bauer, 672 P.2d 26 (Mont. 1983).

[159] Connell v. Board of Educ. of City School Dist., 465 N.Y.S.2d 106 (N.Y. Sup. Ct. 1983).

[160] Taylor v. Berberian, 446 N.Y.S.2d 336 (N.Y. App. Div. 1983).

A local district provision granting administrators contract renewal absent inadequate job performance was viewed by a California appellate court as granting a form of tenure that was preempted by provisions of the state education code. The code provided that tenure may be acquired only in the position of classroom teacher. A former principal, reassigned as a classroom teacher, could not rely on the local district provision as a basis for an expectancy of continued employment as a principal.[162]

A tenured high school principal, involuntarily transferred to the position of junior high school principal, was successful in challenging the transfer as arbitrary and capricious and violative of New York tenure statutes guaranteeing the administrator a right not to be assigned outside his tenure area without consent.[163]

A New York teacher who lost his job in a tenure area of trade electronics when the school board abolished positions in that area due to a reduction in force was entitled to a hearing to determine whether he acquired tenure in the technical electronics area as a result of the nature of teaching he did in the trade electronics area.[164] Similarly, New York teachers who were formerly employed by a board of cooperative educational services were accorded school district employment rights with no change in tenure status when the local district took over operation of the cooperative's services.[165]

No statutory or de facto tenure could be claimed by Illinois physical education teachers who kept teaching jobs but were not reemployed as head coaches of their high school athletic teams. Further, a statement by board members that a change in coaches would be good for the athletic program was not so stigmatizing as to violate liberty.[166]

2.7c Tenure Status

A teacher who, subsequent to attaining tenure, is promoted to a position as "attendance supervisor" does not lose tenure status under the provisions of the Alabama school code.[167] However, a New York teacher could not claim tenure in the separate area of remedial reading when her tenure status had been established in an elementary reading area.[168]

---

[161] Kelland v. Commissioner of Educ., 466 N.Y.S.2d 838 (N.Y. App. Div. 1983).

[162] LaBelle v. San Francisco Unified School Dist., 189 Cal. Rptr. 530 (Cal. Ct. App. 1983).

[163] Bell v. Board of Educ., 468 N.Y.S.2d 85 (N.Y. App. Div. 1983). *But see* Greenspan v. Dutchess Cty. Bd. of Coop. Educ. Servs., 466 N.Y.S.2d 430 (N.Y. App. Div. 1983). Administrative and supervisory appointments do not come within the protection of "tenure areas" for a professional educator under New York law.

[164] Bloom v. Board of Coop. Educ. Servs., 463 N.Y.S.2d 531 (N.Y. App. Div. 1983).

[165] Buenzow v. Lewiston-Porter Cent. School Dist., 458 N.Y.S.2d 841 (N.Y. Sup. Ct. 1983).

[166] Smith v. Board of Educ. of Urbana, 708 F.2d 258 (7th Cir. 1983).

In the absence of a current employment contract creating a right to tenure, school administrators in Michigan were governed by the terms of original employment agreements that excluded tenure. The Michigan Supreme Court was unwilling to hold that the school administrators had acquired tenure by continuing to work without contracts after the expiration of their original written agreements.[169]

A school bus driver has no statutory or contractual right to tenure in the opinion of a New York appellate court. As a consequence, the driver could claim no right to a hearing solely because her position was classified as "permanent."[170]

2.8 CERTIFICATION

2.8a Certification Standards

Following a board of examiner's decision denying a principal's license to an applicant with experience as a "career education coordinator," the applicant challenged the board's determination that her experience did not meet the requirement for "full-time supervisory and/or administrative experience" required to qualify for the license. The New York Commissioner of Education sustained the board's decision and a judicial inquiry was requested to determine whether the commissioner's determination was arbitrary, capricious, or lacked a rational basis. In finding for the commissioner and dismissing the education coordinator's claim, the New York appellate court acknowledged a limited scope of judicial review over decisions related to certification and licensure requirements and affirmed the view that these matters are presumptively within the discretion of boards and state officers.[171]

A New York teacher sought a certificate in elementary education retroactive to 1979 on the grounds that his prior teaching experience satisfied state department certification requirements for supervised student teaching. Without consideration on the merits, the New York appellate court affirmed the trial court's determination dismissing the action on the ground of untimeliness.[172]

---

[167] *Ex Parte* Alabama State Tenure Comm'n, 430 So. 2d 880 (Ala. 1983). *See also* Smith v. Alabama State Tenure Comm'n, 430 So. 2d 877 (Ala. Civ. App. 1983).

[168] Horowitz v. Board of Educ., East Ramapo Cent. School Dist., 465 N.Y.S.2d 67 (N.Y. App. Div. 1983).

[169] Smiley v. Grand Blanc Bd. of Educ., 330 N.W.2d 416 (Mich. 1982).

[170] Voorhis v. Warwick Valley Cent. School Dist., 459 N.Y.S.2d 325 (N.Y. App. Div. 1983).

[171] De Bellis v. Commissioner of Educ., 464 N.Y.S.2d 259 (N.Y. App. Div. 1983).

A former Pennsylvania school administrator and teacher whose certification had been revoked following conviction of a crime involving moral turpitude petitioned for reinstatement from the Pennsylvania Secretary of Education. The teacher was granted a temporary teaching certificate and the secretary made reinstatement of other certificates contingent on fulfillment of experience. On appeal of this decision, the Pennsylvania Commonwealth Court ruled that there was no abuse of discretion in compelling the experience requirement, particularly since the petitioner had been absent from any teaching or administrative duties for over three years, a part of which time he had been in prison.[173]

2.8b Decertification, Revocation, or Suspension

A Pennsylvania school board acted properly in terminating a teacher for failure to obtain recertification prior to the expiration of her interim teaching certificate. Procedural protections normally provided to a certified teacher did not apply to the teacher since the date her certificate expired, rather than the date she obtained recertification, controlled her standing.[174]

A New York appellate court has held the certificate revocation of a teacher's license void as arbitrary and unreasonable in light of evidence the board of education failed to adequately specify the reason for revocation and did not provide timely notice to the teacher that she did not meet minimum licensing requirements.[175]

---

[172] Smith v. Ambach, 460 N.Y.S.2d 839 (N.Y. App. Div. 1983).

[173] Homer v. Commissioner, Dep't of Educ., 458 A.2d 1059 (Pa. Commw. Ct. 1983).

[174] Occhipinti v. Board of School Dirs. of Old Forge, 464 A.2d 631 (Pa. Commw. Ct. 1983).

[175] Novod v. Board of Examiners, 461 N.Y.S.2d 403 (N.Y. App. Div. 1983).

3

BARGAINING

Delbert K. Clear

- Introduction 3.0
- Constitutional Issues 3.1
- Authority to Bargain 3.2
- Recognition of Unions and Representation Problems 3.3
  - Unit Determination 3.3a
    - Supervisory, Managerial, and Confidential Employees 3.3a(1)
    - Other Issues Regarding Recognition and Representation 3.3a(2)
  - Elections 3.3b
- Rights and Obligations of Exclusive Bargaining Representatives 3.4
  - Union Rights 3.4a
  - Union Security 3.4b
  - Obligations of the Exclusive Representative 3.4c
- Scope of Bargaining 3.5
  - Duty to Bargain 3.5a
  - Interrelationship with Other Laws 3.5b
  - Proposals Within Mandatory Scope of Bargaining 3.5c
  - Proposals Within Permissive Scope of Bargaining 3.5d
  - Proposals Within Prohibited Scope of Bargaining 3.5e
  - Terms of Collective Bargaining Agreements 3.5f
- Grievability and Arbitrability 3.6
  - Presumption of Arbitrability 3.6a
  - Who Determines? 3.6b
  - Remedy as a Factor in Arbitrability 3.6c
  - Procedural Issues 3.6d
  - Management Prerogatives as a Bar 3.6e
  - Tenure Issues 3.6f
  - General 3.6g
- Judicial Review of Awards 3.7
  - Standard of Review 3.7a
  - Propriety of Awards 3.7b
- Impasse and Dispute Resolution 3.8
  - Factfinding and Arbitration 3.8a
  - Rights on Expiration of Contract 3.8b

Concerted Activity 3.9
  Strikes 3.9a
  Enforcement Actions 3.9b
Miscellaneous Decisions 3.10
Conclusion 3.11

3.0 INTRODUCTION

Last year's chapter began and ended with the observation that opportunities for litigation in collective bargaining in education seem endless. This year's review has uncovered no reason to modify that observation. Whereas in 1982 over 160 cases were reported, over 190 were published during 1983. The sheer magnitude of the cases suggests that in the dynamic world of collective bargaining and contract administration many polarized, mutually exclusive interests abound and the only way many parties are willing to settle them is via the adversarial "winner take all" promised land of litigation (never mind that the "winners" seldom "take all," given the economic, emotional, and human costs of litigation). Consequently, those who seek only well-settled and stable prospective answers to their particular employer-employee disputes need read no further. No such answers can be derived from collective bargaining litigation that occurred during 1983 (or any other year, for that matter).

Even the most uniformly applied standards, such as the well-established "essence" test to determine the propriety of arbitrators' awards vis-a-vis collective bargaining agreements, are so resistant to prospective application in individual disputes that there is no hope that one day all the possible issues will have been raised and resolved. As a result, litigation continues, not so much to develop and/or identify the standards on which collective bargaining and contract administration will function, but more to resolve individual disputes on a case-by-case basis according to the relatively well-developed standards that have been and continue to be articulated by courts without substantial change.

3.1 CONSTITUTIONAL ISSUES

Three classes of issues generated the majority of constitutionally based decisions: (1) whether granting recognized bargaining agents exclusive access to employer mailing systems constitutes a violation of competing organizations' protected rights; (2) whether "fair share" agreements constitute a violation of nonmembers' protected rights; and (3) whether dismissal or other employer discipline of union members constitutes reprisal for protected activity.

Though the United States Supreme Court established early in 1983 that "providing exclusive access [to school mail facilities] to recognized bargaining representatives is a permissible labor practice in the public sector,"[1] disputes continue to arise regarding the extent to which local practices fit into the generalization. In Texas a collective bargaining agreement provided for the superintendent to review and approve all such mailings. The Court of Appeals for the Fifth Circuit unconvinced that sufficiently compelling state interest existed to justify the practice, hence found it chilling under the first amendment.[2] An unexpected permutation of the principle occurred in Michigan where the court ruled that when an incumbent union officer's candidacy for office is announced, the union may not grant that person exclusive use of its newsletters. Even in administration of its own mailing systems, the union was prevented by the Labor-Management Reporting and Disclosure Act from discriminating against nonendorsed candidates and was ordered to mail a flyer of the opposing slate of officers at union expense. The court of appeals did not share the district court's fear that granting plaintiff's request would constitute excessive entanglement with the union's first amendment rights.[3]

By far the most litigation arose out of various efforts to implement fair share agreements. Here, the 1977 Supreme Court decision in *Abood*[4] that such agreements, per se, do not constitute a violation of nonmembers' rights is applied on a case-by-case, state-by-state basis. Perhaps the most interesting application occurred in the state of Washington where a vacated and remanded decision from the United States Supreme Court was reheard. This time, only state law and constitutional provisions were applied as the standards to examine an employee's request for exemption from an otherwise valid fair share agreement on the basis of his religious convictions. His personal religious tenets against contributing to any secular organizations were found sufficiently compelling to warrant protection. It is noteworthy, however, that he did not ask to retain the saved dollars for his personal use. He had, all along, proposed to donate them to a charitable organization that did not fall under the proscription of his beliefs.[5]

---

1. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 958 (1983).
2. Yselta Fed'n of Teachers v. Yselta Indep. School Dist., 720 F.2d 1429 (5th Cir. 1983).
3. Bliss v. Holmes, 721 F.2d 156 (6th Cir. 1983).
4. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).
5. Grant v. Spellman, 99 Wash.2d 815 (1983).

In Maine, a rival organization that had been established partially out of opposition to a fair share agreement was found to have first amendment protection in expressing its opposition to the certified bargaining unit even where a flyer it sent out contained "false and misleading information designed to confuse unit members."[6] The court concluded that the action "only tended" to interfere with the certified union's security. Since no actual interference or intentional or knowing misrepresentation had occurred, the dissident group's first amendment rights prevailed over the established organization's claims of unfair labor practice.

Determining the amount that is "fair" under the *Abood* doctrine generates much litigation. Practices range from deducting, on the one hand, some rationally determined percentage of members' dues that is devoted to "costs of bargaining and contract administration" (as opposed to political activity) to the unions' baldly certifying, on the other, that the costs of representation are equivalent to the members' dues. Court decisions tracked an equally broad range. A federal district court in New Jersey enjoined (pending changes in legislation) collection of full dues first, then providing for refund through challenges of one sort or another because it found the refund procedures "so onerous that they are unusable."[7] In both California and Michigan, by contrast, courts found that not only was a pay first, obtain refund later practice constitutionally permissible, but also that employment relations board's appeals regarding it must be exhausted prior to litigation. This arises, according to the rulings, because the constitutional defects, if any, would be nominal, making the practice no more than arguable as an unfair labor practice.[8]

Direct challenge to the constitutionality of fair share fees as improperly delegating power to employment relations boards was turned aside in Minnesota when a court found that the state's interest in orderly and "enlightened" labor relations was greater than any individual community college faculty member's right of free association (including *not* to associate). The only constitutional flaw it found in the legislation was its granting association members sole participation in selecting "meet and confer" representatives. This decision was particularly significant in that the court found fair share fee agreements justified, despite being convinced that "[v]ital concern for academic freedom warrants a heightened standard of scrutiny when, as here, the state regulates the forum for academic speech."[9] The court's response to the claim that the various local and national political action committees of the labor organization constituted improper and unconstitutional use of fair share fees was that such activities, even where clearly partisan, were based sufficiently on voluntary participation independent of dues to thwart the argument. Other political activities, the court found, were wholly proper because each of the challenged practices was "predominately engaged in activities closely and directly related to collective bargaining."[10]

---

[6] Association of Indep. Professionals v. Maine Labor Rels. Bd., 465 A.2d 401, 412 (Me. 1983).

[7] Robinson v. New Jersey, 547 F. Supp. 1297, 1323 (D.N.J. 1982).

[8] Link v. Antioch Unified School Dist., 191 Cal. Rptr. 264 (Cal. Ct. App. 1983); Board of Educ. of Detroit v. Parks, 335 N.W.2d 641 (Mich. 1983).

A similar conclusion was reached in Hawaii, where "conscious, knowing, and deliberate intent" to direct funds to partisan and political activity was the standard required to invalidate the constitutionality of agency fees, even though the union expenditures under challenge had been found by the PERB to have been impermissible.[11]

Still unclear among the various jurisdictions is the standard by which proportional fees will be examined in determining their constitutionality. The United States Supreme Court's skirting of the matter in *Abood* has left the determination up to lower courts, which has resulted, inevitably, in variability among jurisdictions. In New York, a court found that such fees, though exactly equal to members' dues, were not unconstitutional, per se, where a rebate procedure was in effect. In the case at hand, it could find no evidence that unauthorized use was being made of plaintiffs' money, leading the court to conclude that absent clear and convincing evidence of such, a presumption must be made that the fees were being used permissibly. In sum, the burden of proof, through showing of evidence, is placed squarely on the plaintiffs; no abstract claims will be honored.[12] However, no impediments may be placed in the way of dissident employees who wish to engage in discovery investigation regarding the use of the fees. According to a federal district court in Michigan,

> First Amendment principles establish that the loss of freedom of speech, assembly, or association, for even minimal periods of time, constitute irreparable injury. Additionally, the fact the plaintiff's monetary damages may be minimal in no way makes the inquiry in the instant dispute less complicated or important.[13]

---

[9] Knight v. Minnesota Commun. College Faculty Ass'n, 571 F. Supp. 1, 9 (D. Minn. 1982).

[10] *Id.* at 7.

[11] Aio v. Hamada, 664 P.2d 727 (Hawaii 1983).

[12] Haag v. Hogue, 456 N.Y.S.2d 978 (Sup. Ct. 1982).

[13] Lehnert v. Ferris Faculty Ass'n, M.E.A.-N.E.A., 556 F. Supp. 316 (D. Mich. 1983).

In Indiana, a fair share fee only slightly smaller (about $8.00 less) than association dues was found constitutionally valid even though expressed statutory permission to engage in agency shop agreements is absent. Paying it did not, contrary to plaintiffs' arguments, constitute involuntary membership.[14] Similar conclusions were reached by courts in Michigan and Illinois, even to finding that agreements providing for discharge of tenured teachers for failure to pay the fees do not transgress property or other interests.[15]

Curious applications of fair share provisions sometimes occur. In Ohio, a university's refusal to withhold dues of members of unrecognized unions was found to be rationally related to the university's legitimate interest in controlling administrative costs and preserving labor peace. The court was not convinced that the unrecognized units suffered unconstitutional deprivation of equal protection of the law.[16] In Virginia, legislative provisions for dues checkoff for teachers were found not to require extending the practice to police employees through equal protection guarantees.[17]

Teachers in several states found themselves in situations where it appeared to them that they were being disciplined for engaging in protected organizational activity. Most often the issue was dismissal, but changes in assignment also triggered the claims. The conclusions in all were consistent: where the teacher was able to show plausible evidence that the board's action was motivated by displeasure with filing grievances, making critical speeches, or any other associational activity, the court reinstated.[18]

Not all such claims prevailed, however. The board's reassignment of a teacher from teaching psychology to English was upheld in Kentucky. The decision to change the assignment, the record revealed, had been made prior to an association-related controversy that had occured. Similarly, failure to rehire teachers in Mississippi was found not to have been motivated by their union activities.[19] The United States Supreme Court's decision in *Connick v. Meyers*, upholding an employee's dismissal for associational activity, clearly limits, however, the protection currently available. According to the Court,

---

[14] Fort Wayne Educ. Ass'n v. Goetz, 443 N.E.2d 364 (Ind. Ct. App. 1982).

[15] Parks, *supra* note 8; Hudson v. Chicago Teachers' Union, Local No. 1, 573 F. Supp. 1505 (N.D. Ill. 1983).

[16] Ohio Civil Serv. Employees' Ass'n v. University of Cincinnati, 444 N.E.2d 1353 (Ohio Ct. App. 1982).

[17] Decker v. Hampton (E.D. Va., No. 82-109-NN) ¶37,745, *1981-1983 Public Bargaining Cases* (Chicago: Commerce Clearing House, 1984), at 39,444.

[18] Napoleon Educ. Ass'n v. Napoleon Commun. Schools, 336 N.W.2d 481 (Mich. Ct. App. 1983); Thomas v. Farmer, 573 F. Supp. 128 (D. Ohio 1983).

[19] Reichert v. Draud, 701 F.2d 1163 (6th Cir. 1983); Jackson v. Hazelhurst Mun. Sep. School Dist., 427 So. 2d 134 (Miss. 1983); Tanner v. Hazelhurst Mun. Sep. School Dist., 427 So. 2d 977 (Miss. 1983).

> [w]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[20]

Among the miscellaneous and sometimes more creative constitutional claims filed were efforts to utilize the first and fourteenth amendments to *establish* vested interest, rather than to vindicate already recognized rights. In Ohio, where faculty members sought to require the university to enter into a collective barbaining agreement, a court ruled flatly that it could not mandate collective bargaining through either equity or law-based rationale.

> While fundamental First Amendment rights of freedom of speech, association and assembly are admittedly applicable to public employees, thus preserving their right to organize and select a bargaining representative, such latter right continues to exist and is not impaired or negated by a refusal of a public body to grant collective bargaining. No fundamental right is infringed by such refusal.[21]

Nontenured employees in Illinois and Tennessee were equally unsuccessful. They failed to convince courts that describing evaluation procedures in the collective bargaining agreement and establishing grievance procedures in policy manuals created sufficient expectation of reemployment to invest their positions with a property interest. Full due process hearings prior to nonrenewal of probationary contracts were not, therefore, required. The Tennessee court was particularly blunt in rejecting the claim: "No process is due plaintiffs but that which the state voluntarily gives them."[22]

The following were held insufficient, in and of themselves, to invest first and fourteenth amendments protection sufficient to create a federal cause for action: (1) a teacher's reference to the "welfare of the students" at a termination hearing; (2) reducing annual contract salary amounts commensurate with time lost due to an illegal strike; and (3) refusing a "step up" the salary schedule after the expiration of an agreement and during impasse.[23] None of the rulings, however, foreclosed the possibility of recovery under state proceedings.

---

[20] Connick v. Meyers, 103 S. Ct. 1684, 1690 (1983).

[21] Ohio Univ. Faculty Ass'n v. Ohio Univ., 449 N.E.2d 792, 795 (Ohio Ct. App. 1982).

[22] Board of Trustess, Commun. School Dist. No. 513 v. Krizek, 446 N.E.2d 941 (Ill. App. Ct. 1983); Robertson v. McElrath, 661 S.W.2d 88, 91 (Tenn. Ct. App. 1983).

First amendment issues were raised in two disputes over extending labor relations legislation into church-operated schools. In New York, the state Labor Relations Board's assertion of jurisdiction in unfair labor practice claims by lay employees of the Archdiocese of New York City was found to result in excessive entanglement. By contrast, in West Virginia a court found that extending the minimum wage and equal pay provisions of the federal Fair Labor Standards Act to church-operated schools would not constitute free exercise or establishment violations. A distinction was made, however, between lay employees and those who were members of the "religious order."[24]

In a claim that the school board's rehearing of a dispute on remand was defective due to bias because it included three members who had originally heard the matter, a court looked in vain for such evidence: "[plaintiff] gives us no reason to doubt the statements of the Board members other than his own belief that it could never impartially decide his case. We reject that unfounded belief and conclude that his due process rights were not violated." A strongly worded dissent disagreed, however, finding that "[plaintiff's] constitutional, statutory, and contractual rights were trampled upon by the board."[25]

3.2 AUTHORITY TO BARGAIN

Although authority to bargain is well established in most jurisdictions, there is little doubt that a public employer may not do so without expressed statutory authorization. Such authority, moreover, must come directly; it cannot be imputed via a state's general industrial relations statutes.[26] In Alabama, a county board of education's method of reducing its teaching staff, inter alia, was developed and implemented after "meet and confer" discussions with the employees' association pursuant to state law. Subsequently the board attempted to abrogate the reduction in force procedures, claiming that it was required to follow the statutes, which were somewhat different, and took the position that its original adoption of the policy was illegal, having been the product of bargaining that was expressly foreclosed by the statutes. The court did not agree, finding that despite the discussions, which were both authorized and mandated, the board had unilaterally adopted the policies. Once adopted, said the court, the board was bound by them until such time as they were changed. Absence of expressed authority to bargain, per se, did not prevent it from entering into voluntary agreements that would be binding until changed—even to submission of disputes over their interpretation to advisory (but not binding) arbitration.[27]

---

[23] Renfroe v. Kirkpatrick, 722 F.2d 714 (11th Cir. 1983); Ash v. Board of Educ., Woodhaven School Dist., 699 F.2d 822 (6th Cir. 1983); New Castle Cty. Voc.-Tech. Educ. Ass'n v. Board of Educ., New Castle Cty. Voc.-Tech. School Dist., 569 F. Supp. 1482 (D. Del. 1983).

[24] Catholic High School Ass'n, Archdiocese of New York v. Culvert, 573 F. Supp. 1550 (D.N.Y. 1983); Donovan v. Shenandoah Baptist Church, 573 F. Supp. 320 (D. W. Va. 1983).

[25] Olds v. Board of Educ., Nashua Commun. School Dist., 344 N.W.2d 765, 769, 774 (Iowa Ct. App. 1983).

[26] Lincoln Educ. Ass'n v. School Dist. City of Lincoln, 336 N.W.2d 587 (Neb. 1983).

In Florida, the court recalled its own 1982 decision in which it had extended to the board of regents the authority to bargain with a number of employee units. To clarify that graduate assistants of various types in the university system were among them, the court vacated the PERC's refusal to certify one such unit and revised its 1982 decision specifically to include them.[28]

In Hawaii, the board of regents of the university was found to have statutory and constitutional authority to agree to submit disputes regarding tenure and promotion to binding arbitration and to empower the arbitrator to reverse official decisions found to be arbitrary or capricious.[29] A court in Maine, in approving an arbitrator's reinstatement of a dismissed teacher, reminded litigants that absent specific statutory authority (which the court had found) boards would lack the authority to subject dismissals to review by arbitrators.[30]

A clear-cut issue regarding authority to bargain arose under federal jurisdiction when principals and assistant principals of schools on military bases in the Caribbean sought to bargain an agreement with the Department of the Navy. The court declined to accept plaintiffs' argument that the authority to do so could be found in a statute that requires the schools in the region to be maintained on a par with those in the District of Columbia.

> There is nothing either in the language of the statute or in the legislative record examined to support plaintiffs' position. Furthermore, to derive rights of collective bargaining from the silence of the record would not only require an unwarranted exercise of judicial interference with the statute, but may also

---

[27] Walker Cty. Bd. of Educ. v. Walker Cty. Educ. Ass'n, 431 So. 2d 948 (Ala. 1983).

[28] United Faculty, Local 1847 v. Board of Regents, State Univ. Sys., 423 So. 2d 429 (Fla. Dist. Ct. App. 1982).

[29] University of Hawaii Professional Assembly, Daeufer v. University of Hawaii, 659 P.2d 720 (Hawaii 1983).

[30] Cape Elizabeth School Bd. v. Cape Elizabeth Teachers' Ass'n, 459 A.2d 166 (Me. 1983).

> lead to dangerous results that may affect the principal purpose of this legislation in guaranteeing quality education to the children of certain military servicemen and federal employees.[31]

The court did, however, order an investigation into the plaintiffs' claim that they were not receiving equal treatment with their counterparts in the District of Columbia as required by federal law.

3.3 RECOGNITION OF UNIONS AND REPRESENTATION PROBLEMS

3.3a Unit Determination

3.3a(1) Supervisory, Mangerial, and Confidential Employees

Whether it is appropriate, in the abstract, for supervisory employees to organize and collectively bargain has been little discussed. There was, in fact, no litigation reported during 1983 that was rooted solely in that issue. In Wisconsin, efforts continue to pass legislation granting such rights to them. Though the law is sponsored primarily by the Administrators' and Supervisors' Council of the Milwaukee Public Schools (an organization that informally bargains with the board for its members' interests—it even has a full-time executive secretary), the current version has been amended to apply statewide. Similar legislation has failed in previous sessions of the legislature. Without question, middle-level administrators, as public employees, lack authority to organize and bargain, absent specific legislative permission to do so. Whether there might be some constitutional defect in legislation permitting it remains to be seen, although the number of such organizations that currently exist suggests that this argument will be a difficult one to sustain.

3.3a(2) Other Issues Regarding Recognition and Representation

Recognition and the right to represent do not extend to every group that perceives itself to have common interests. Coaches in a Michigan district, for example, were found not to be certifiable as an independent unit. Well-established principles not favoring fractionalization were cited by the court, along with comments regarding the overriding community of interest the coaches had with other teachers during most of their teaching day.[32] In New York, certain continuing education instructors were found to lack public employee status as defined in the law and, hence, were denied the right to organize and engage in bargaining.[33] An arbitrator in Illinois exceeded his authority by hearing a grievance brought on behalf of substitute teachers. The court found that the substitute teachers, in not being members of the association, could not have their dispute with the board carried forward by the bargaining unit.[34] The special insight that arbitrators have in labor matters was recognized by a court in Florida, which ruled that the PERC could not reject an arbitrator's finding that an employee as a member of a particular unit, and, hence, could file a grievance under the collective bargaining agreement. Similar decisions occurred in Massachusetts and Pennsylvania.[35]

---

[31] Antilles Council of School Officers, Local 68, Am. Fed'n of School Adm'rs, AFL-CIO v. Lehman, 550 F. Supp. 1238, 1244 (D.P.R. 1982).

[32] Michigan Coaches' Ass'n, Warren Consol. School Dist. Local No. 1 v. Warren Consol. Schools' Bd. of Educ., 321 N.W.2d 432 (Mich. Ct. App. 1982).

3.3b Elections

Elections were a source of a fair amount of litigation during 1983. A Pennsylvania trial court had reversed a PERB certification of a unit and ordered a new election because of irregularities in voter eligibility. The appellate court reversed, finding that since no challenge to some of the voters' eligibility had been included in the initial unfair labor practice complaint that had eventuated in the litigation, the trial court had improperly considered the matter. The parties' original, though tacit, agreement on the original list of certified members bound them to it, and the matter could not be raised at a later date.[36]

In Nebraska, where the Teachers' Professional Negotiations Act (TPNA) does not require boards either to recognize or to bargain with a teachers' association, a unit sought certification under the state's Commission of Industrial Relations Act. The Commissioner of Industrial Relations (CIR) ordered an election, which was held, with the plaintiff association receiving a clear majority of the votes. Nevertheless the board refused to bargain with the unit, claiming that the Commission of Industrial Relations had no jurisdiction. The court found the provisions of the state's Teachers' Professional Negotiations Act to be clearly exhaustive of procedures due the teachers and reversed the commission's assertion of jurisdiction. With a hint of impatience, it commented that

---

[33] Boces III Faculty Ass'n, N.Y.S.U.T., AFT, AFL-CIO v. Public Employment Rels. Bd., 460 N.Y.S.2d 362 (N.Y. App. Div. 1983).

[34] Board of Educ., Meridian Commun. Unit School Dist. No. 101 v. Meridian Educ. Ass'n, 445 N.E.2d 864 (Ill. App. Ct. 1983).

[35] Leapley v. Board of Regents, Florida State Univ. Sys., 423 So. 2d 431 (Fla. Dist. Ct. App. 1983); Commissioner of Admin. v. Local 509, Serv. Employees' Int'l Union, AFL-CIO, 447 N.E.2d 683 (Mass. App. Ct. 1983); Northwest Tri-Cty. Intermediate Unit No. 5 Educ. Ass'n v. Northwest Tri-Cty. Intermediate Unit No. 5, 465 A.2d 89 (Pa. Commw. Ct. 1983).

[36] Bucks Cty. Schools, Intermediate Unit No. 22 v. Pennsylvania Labor Rels. Bd., 446 A.2d 262 (Pa. Commw. Ct. 1983).

> [h]owever imaginatively the proposition is stated, whether in terms of relative bargaining power of the parties or in terms of the limitation on the power of the districts as compared to the CIR, the effect of the method proposed by the appellee association is to render useless the TPNA. No authority is cited as to how or by what rationale we are to ignore the plain words of [the statute], nor how we may ignore the requirements of the TPNA. The actions of the CIR were clearly without jurisdictional basis and the decisions are reversed.[37]

In Massachusetts, a supervisor in a university's transportation department had engaged in prounion activity during a certification election campaign. The university attempted to have the vote in favor of affiliation set aside because of this arguably improper interference. The court found that the unclear employment status of the employee prior to the election made the impropriety of his influence open to question. Further, it observed, "[w]e recognize the well-established rule that an employer who 'stand[s] idly by after learning that one of its supervisors has engaged in pro-union or anti-union conduct' may be precluded from raising that supervisor's conduct as an objection to the union election."[38]

The Ohio Supreme Court found that the existence of an unexpired agreement was no bar to an order mandating a new election. A majority of the unit's members had signed petitions requesting a new election; it had been more than five years since the most recent one; and the current contract was in the final one-quarter of a three-year duration. The absence of controlling statutes made it possible for the court to base its decision on equitable principles.[39] A court in Pennsylvania found similarly, basing much of its decision upholding a PERB ruling on NLRB precedent. In this case, the board was required to open negotiations even though the new unit had been certified within two months after both the board and the former unit had signed and ratified a two-year agreement.[40]

3.4 RIGHTS AND OBLIGATIONS OF EXCLUSIVE BARGAINING REPRESENTATIVES

3.4a Union Rights

Once certified, the bargaining unit has the right to represent its members' interests with as much vigor as it chooses. However, as discussed in sections 3.1 and 3.2, such rights must be explicitly derived from statutory or constitutional provisions. For instance, provisions for dues check-off for teachers' unions did not, by extrapolation, extend to police units in the same municipality.[41] Union rights are more often tested when individuals doing the representing come under some sort of organizational changes such as reduction in force, nonrenewal, discharge, transfer, or changes in wages (in short, any of their working conditions). When this occurs, the possibility arises that the district has engaged in retaliation for union activity, clearly a violation of the employee's right to represent. On the other hand, if the change in working conditions would have occurred absent the activity, no such right is implicated.[42]

---

[37] Lincoln, *supra* note 26, at 590.

[38] NLRB v. Northeastern Univ., 707 F.2d 15, 19 (1st Cir. 1983).

[39] Association of Cuyahoga Cty. Teachers of Trainable Retarded v. Cuyahoga Cty. Bd. of Mental Retardation, 451 N.E.2d 1215 (ohio 1983).

[40] Richland School Dist. v. Pennsylvania Labor Rels. Bd., 454 A.2d 649 (Pa. Commw. Ct. 1983).

Though these parameters of the law are known to all, many cases occurred during 1983 that tried the facts of particular situations to determine where the disputes fell within them. Active union members were both protected and unprotected in states where there is no tenure, as well as where it is a long-established practice. In Mississippi, for instance, teachers do not have tenure; they have, by law, only an opportunity "to present matters in extenuation or exculpation to enable the board to determine whether the recommendation of nonemployment is a proper decision and not contrary to law, *and not to establish a system of tenure or require that all decisions of nonreemployment be based on cause.*"[43] Here, the teacher was unable to provide fact testimony to support a claim that his membership in the union was the principal motivation in the board's decision to nonrenew his appointment and the court found that "[t]he burden was upon the appellant to prove that the predominant reason for non-renewal of his contract was due to membership in, or connection with, the labor union, and he wholly failed to meet that burden."[44]

Similarly in Michigan, even though tenure is strongly established there, discharged employees were unsuccessful in showing that their dismissals were due to their union activity. The court discussed at length the burden of proof standard:

> In *Wright Line* [102 S. Ct. 1612], the Court held that where it is alleged that a discharge is motivated by anti-union animus the burden is on the party making the claim to demonstrate that protected conduct was a motivating factor in the decision of the employer to discharge the employee. Once this showing is established, the burden then shifts to the employer to

---

[41] Decker, *supra* note 17.

[42] Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

[43] Jackson, *supra* note 19, at 136.

[44] *Id.* at 137.

> demonstrate that the same action would have taken place even in the absence of the protected conduct. The burden of the employer is one of going forward to meet the prima facie case established by the employee. It is not a burden of persuasion on the ultimate issue of the existence or non-existence of a violation. It is a balancing of the evidence. If the employer, by credible evidence, balances the employee's prima facie case, the employer's burden of proof is met and the duty of producing further evidence shifts back to the employee. The burden of the employer referred to is a burden of production of evidence to meet the prima facie case of the employee. If the burden of the employer is met, the burden is then once again on the employee. As the court in *Wright Line* pointed out, however, burdens of "persuasion" and "production" are not, as a practical matter, likely to be very important in most cases as decisions will usually turn on a weighing of the evidence.[45]

Particularly convincing to the court was the fact that work-related unsatisfactory ratings and disciplinary steps had been taken with the employee prior to his having engaged in union activity.

Other such disputes in Michigan, Massachusetts, and Vermont resulted in different outcomes. Here, the burden of proof shifted clearly to the employers, and their responses were found insufficient to relieve themselves of claims of improper retaliation for protected associational activity. The Michigan court was explicit in its finding that, absent compelling facts to the contrary, the MERC's finding of improper motivation should be upheld.

> Although we might have reached a different conclusion sitting as trier of fact, the commission's factual conclusions were supported by competent, material, and substantial evidence. . . . Reasonable minds could easily differ on the weight to be given the various reasons. . . . MERC has presented a sound theory based on reasonable inferences and records evidence supporting its conclusion. The great weight of the evidence does not rest with either side. We therefore, defer to MERC's judgement.[46]

The right of an employees' organization to be creative in pursuit of its members' interests was vindicated by a New York court that approved an agreement wherein it was intended that the employees' association would eventually subcontract with the board for transportation services rather than have its members remain district employees. The state Civil Service Employees' Association had alleged that the PERB's approval of the union's petition to withdraw from state affiliation was improper due to its intention not to remain a traditional labor organization.[47]

---

[45] Michigan Educ. Support Personnel Ass'n v. Evart Pub. Schools, 336 N.W.2d 235, 237 (Mich. Ct. App. 1983).

[46] Napoleon, *supra* note 18, at 484; School Comm. of East Brookfield v. Labor Rels. Comm'n, 449 N.E.2d 672 (Mass. App. Ct. 1983); Kelly v. Day Care Center, Inc., 451 A.2d 1106 (Vt. 1983).

Teachers' associations in New Jersey and Rhode Island were successful in asserting the general right to record electronically, including video-taping, school board meetings under certain conditions and without school board consent. The New Jersey court established detailed guidelines and requirements, all of which were designed to minimize distractions. Closed sessions, as defined in the law, were excluded.[48]

3.4b Union Security

Maintenance of organizational health is a perennial concern in any organization; not only are unions and other employee bargaining units not immune from the task, but also they must give it extraordinary attention because they are voluntary associations devoted solely to obtaining benefits for their members that will outweigh the costs of belonging. This represents a more volatile security base than that of school boards who can depend on being needed and receiving continued funding regardless of what they do (within reason). Consequently, employee units take various steps to enhance organizational security even though, on their face, the practices may arguably violate certain individuals' personal preferences. The courts' responses to employee complaints about the practices is to defer to the organizations' collective needs, most often citing the state's legitimate interest in fostering labor peace as justifying a board's agreeing to such provisions. Courts seldom examine whether the methods selected actually do result in labor peace. Rather they take the stance that if the matter is considered important by the labor organization, and if it would not be a gross violation of constitutional or statutory law, then sufficient justification for granting it exists.

The most frequently litigated security provisions are (1) fair share or agency shop agreements wherein nonmember employees are required to contribute funds to the union treasury; (2) granting the recognized unit exclusive access to inhouse mailing systems; and (3) statutory and contractual prohibition against the district's bargaining with nonrecognized units or individuals. (Litigation regarding the first two of these is invariably couched in constitutional terms; it has been reviewed in section 3.1.) A nonconstitutional claim regarding fairshare fees was raised in Michigan, however, and the court ruled that dismissal of a tenured teacher for refusal to pay the fees was justified, inasmuch as the state's PERA specifically stated that fairshare legislation was not to be limited by any other legislation. The court was especially persuaded by the consistent findings in federal jurisdictions that discharge is a permissible remedy for the breach of this contractual condition of employment.[49]

---

[47] Civil Serv. Employees' Ass'n v. Newman, 457 N.Y.S.2d 620 (N.Y. App. Div. 1982).

[48] Belcher v. Mansi, 569 F. Supp. 379 (D.R.I. 1983); Maurice River Twp. Bd. of Educ. v. Maurice River Twp. Teachers' Ass'n, 455 A.2d 563 (N.J. Super. Ct. 1983).

Other employer practices from time to time implicate union security, though not every conceivable obstacle for an employee association is found to be impermissible. In Ohio, a university's practice of refusing to withhold dues for unrecognized units was found to be rationally related to the public interest in maintaining labor peace (with certified unions) and controlling the costs of administration.[50] A Tennessee law establishing that only when a union's membership achieved 20 percent or more of all employees would dues checkoff benefits be extended was found not unduly restrictive to minority units.[51]

Perhaps the most potentially far-reaching harbinger of union insecurity was announced in Illinois, where collective bargaining is just beginning to occur in education throughout the state under newly adopted legislation. Here, it was found that nothing in the statute required boards to grant any organization exclusive status and that, absent such a provision in a local agreement, a board can bargain with individual teachers. The statute, however, was found to prevent a board from bargaining with any organization other than a certified one.[52]

3.4c Obligations of the Exclusive Representative

A direct line of logic runs from the authority contained in legislative provisions for employees to organize voluntarily for purposes of collective bargaining to the expectation that any such organization so constituted has an obligation to represent the interests of its constituency. Though this logic seems sufficiently compelling to defy gainsaying, it is easy to overlook the fact that bargaining legislation not only establishes the opportunity to bargain but also creates a common-law responsibility on the part of the employee organization to pursue the interests of all of its members, including the *obligation* to grieve all contract violations.

---

[49] Parks, *supra* note 8, *passim*.

[50] Ohio Civil Serv., *supra* note 16.

[51] Brown v. Alexander, 718 F.2d 1417 (6th Cir. 1983).

[52] Minooka High School Educ. Ass'n v. Board of Educ., Minooka Commun. High School Dist. No. 111, 457 N.E.2d 162 (Ill. App. Ct. 1983).

In Massachusetts and Montana, unions were alleged to have failed in this obligation and, by not having grieved the matters, to have voluntarily waived the right to do so. In both instances, the courts adopted a very narrow stance in rejecting the districts' claims, but the rationale in both decisions clearly preserved the possibility of such a waiver arising out of conscious, deliberate, and explicit union action or inaction. In the Massachusetts case the court found that such a waiver did not derive from "boiler-plate, zipper clause" language reserving all rights not contained in the agreement to the employer. According to the court, waiver can arise only when one party can

> show that the other party clearly and unmistakably waived its right to bargain over an unlawful unilateral change where the other party had actual notice of the proposed change, a reasonable opportunity to negotiate over it, and unreasonably or inexplicably failed to bargain or to request bargaining.[53]

In Montana, a union had long neglected to grieve the district's practice of not paying for unused sick leave upon teachers' retirements. In the case at hand, the union sought an order to begin compliance with the terms of the agreement and five years' retroactive payments. Noting that the provision had never been followed, the trial court found that

> [t]he long acquiescence of the [Union] in the [school district's] consistent and systematic exclusion of additional cumulative sick leave from severance pay, contrary to the express provision of the contract, constituted a waiver of the provision and agreement to amend the contract to allow for such exclusion.[54]

Though the appellate court reversed, its decision was based primarily on the procedural defect that the district had not affirmatively plead such a waiver in its initial response to the union's allegations. Amendment of the district's answer to include pleading on the waiver issue was not precluded in the court's remand to the trial court for rehearing.

Obligations of the representative during bargaining were highlighted in a New York case where retired teachers felt that calculation of their retirement allowances was in error. Their suit against the board was dismissed as against the board of education, inasmuch as the basis for the initial calculation that the board had followed was contained in the collective bargaining agreement. The court also found that the terms of the agreement extended to the retired members, who were bound by it. Union obligation in the matter was sharply focussed by the court's observation that "[i]f, as petitioners suggest, their interests were improperly overlooked by the union in reaching the settlement, then petitioners' remedy is against the union for breach of its duty to represent them in good faith."[55]

---

[53] School Comm. of Newton v. Labor Rels. Comm'n, 447 N.E.2d 1201, 1210 (Mass. 1983).

[54] Butte Teachers' Union Local No. 332, AFL-CIO v. Board of Trustees, Butte School Dist. No. 1, Silver Bow Cty., 655 P.2d 146, 148 (Mont. 1982).

On the other hand, unions do not have to carry every grievance through to arbitration (where such is provided). They may refuse to process members' grievances at any stage, from initial filing to continued appeals, so long as they do not do so in bad faith, arbitrarily, or discriminatorily.[56] The principle extends, as well, to nonmembers' grievances, so long as nonmembership does not constitute the sole reason for such refusal. A nonmember in Florida was foreclosed from filing for arbitration ot an alleged unfair labor practice by the collective bargaining agreement, which gave control over decisions to request arbitration to the bargaining unit.[57] A court in Pennsylvania ruled similarly, noting that an employee who feels that the union has inadequately represented him or her should file an unfair labor practice with the PERC rather than litigate.[58]

A court in New York underscored the broad responsibility that falls to unions by virtue of the collective bargaining agreement in noting the following regarding a teacher who was dissatisfied with the arbitrator's disposition of her grievance:

> As a member of the United Federation of Teachers, and subject to that union's collective bargaining agreement with the defendant board of education, plaintiff has abrogated her individual right to sue defendants for violations of that agreement, absent a showing that the union has breached its duty to represent her fairly.[59]

The obligaton of the employees' association to avoid contract or statutory violations was underscored in Idaho where, though the court ultimately ignored the behavior, it sternly lectured the association regarding its unlawful work stoppage and inflammatory statements made in the public press. Such actions, explained the court, could result in failure to meet the "clean hands" requirement, which "stands for the proposition that 'a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue.' "[60]

---

[55] Abrams v. Board of Educ., City of Yonkers, 456 N.Y.S.2d 798, 800 (N.Y. App. Div. 1982).

[56] Stempien v. Civil Serv. Employees' Ass'n, 458 N.Y.S.2d 381 (N.Y. App. Div. 1983).

[57] Galbreath v. School Bd. of Broward Cty., 424 So. 2d 837 (Fla. Dist. Ct. App. 1983).

[58] Ford v. School Dist. of Philadelphia, 453 A.2d 705 (Pa. Commw. Ct. 1982).

[59] Menkes v. City of New York, 457 N.Y.S.2d 99, 101 (N.Y. App. Div. 1982).

An obligation of the exclusive representative was established in a Florida case that, although it did not arise in a school, did come out of a public agency. Here, the PERC awarded attorney's fees to a hospital employer that had been required to defend itself in a discrimination case wherein, according to the court, "the union knew or should have known of the dearth of evidence of anti-union animus on the hospital's part, and that the charge was frivolous." Accordingly, said the court, the union's "unreasonable tenacity is grounds for an award of attorney's fees."[61]

Taken together, these cases indicate that the exclusive representative has clear obligations to avoid extremes in its pursuit of individual employee's or associational interests. It may neither carelessly shirk that duty nor callously pursue it with blind zeal. It must always be somewhere between the bipolar opposites.

3.5 SCOPE OF BARGAINING

3.5a Duty to Bargain

Such is the relative maturity of bargaining legislation and practices in most jurisdictions that generalized refusal to bargain rarely is charged by either side. It does arise, however, indirectly, such as refusal to bargain with newly certified units, either initial ones or ones newly certified during the pendancy of ratified agreements. Two such instances are discussed in section 3.3b. More often, duty to bargain arises regarding specific topics wherein one party perceives that a particular matter is a mandatory subject of bargaining, whereas the other feels it is either permissive or prohibited.

In Tennessee, a board's unilateral termination of its contributions to the employee group health insurance policy while negotiations were proceeding (impasse had not been declared) was found to be failure to bargain. The board's claim of inability to pay was found not persuasive.[62] Failure of the Regents of the University of Alaska to ratify a collective bargaining agreement that had been submitted to it was found not to be refusal to bargain in good faith.[63]

---

[60] Gilbert v. Nampa School Dist. No. 131, 657 P.2d 1, 9 (Idaho 1983).

[61] National Union of Hospitals v. Southeast Volusia Hospital Dist., 436 So. 2d 294, 296, 297 (Fla. Dist. Ct. App. 1983).

[62] Smith Cty. Educ. Ass'n v. Anderson (Tenn. Ct. App. No. 88--30-11, 1983) ¶37,828, *supra* note 17 at 39,569.

[63] Alaska Commun. Colleges Fed'n of Teachers, Local No. 2404 v. University of Alaska, 669 P.2d 1299 (Alaska 1983).

In Connecticut, a court found a board in violation of its statutory obligation to bargain in good faith by refusing to abide by a ratified agreement. The board had refused to provide the association with certain information it wanted to determine whether grievances would be filed regarding the district's elimination of several teacher-coordinator positions. The board partially complied, but refused to provide all the detailed information requested by the union, in part because some of the information had been destroyed and in part because of the board's belief that the grievances contemplated would be groundless and otherwise without merit. Both the PERB and the court found that the duty to bargain "requires an employer to provide relevant information that is needed by the representative for the proper perfection of his duties .... That obligation extends beyond the period of contractual negotiations to the union's need for information while administering and policing the contract."[64] The employer's convictions on the merits of the proposed grievances were found to be irrelevant.

Duty to bargain was extended into the duration of the agreement by a Massachusetts court that required a board to reopen bargaining when layoff not contemplated by the agreement became necessary. A general management rights clause was found not sufficient to overcome the employer's duty to bargain over unanticipated changes in conditions of employment.[65] Duty to bargain was similarly extended into certified impasse by a California court that turned aside a board's attempt to implement its last best offer unilaterally. Certified impasse procedures, the court reminded, do not signify the end of bargaining, but contemplate a continuation of the bilateral negotiations process. Mediation remains fundamentally a bargaining process albeit with the assistance of a neutral third party."[66]

In a case that is unusual only because duty to bargain disputes are seldom decided in favor of the employer's attempts to narrow the scope of its obligation, a board in Minnesota was permitted to reassign a teacher to teach part-time in an adjacent district. The action was found to be allowable both within the provisions of the collective bargaining agreement and within the proper exercise of management rights. The court was unpersuaded that the general requirement to bargain on the "impact" of management decisions was sufficient to reach the dispute at hand. A key factor in the decision was that the

---

[64] West Hartford Bd. of Educ. v. State Bd. of Labor Rels., 460 A.2d 1255, 1258, 1259 (Conn. 1983).

[65] Newton, *supra* note 53.

[66] Moreno Valley Unified School Dist. v. Public Employment Rels. Bd., 191 Cal. Rptr. 60, 65 (Cal. Ct. App. 1983) (quoting, with approval, the language of the PERB in its initial disposition of the dispute).

criteria for selecting teachers for such assignment, though clearly a proper topic of bargaining, had never been included in the agreement.[67]

3.5b Interrelationship with Other Laws

Inasmuch as public sector bargaining functions wholly within statutory grants of authority, all such activities may be considered, ultimately, to be the product of interaction with other laws. This is particularly true of disagreements about mandatory, permissive, and prohibited topics of bargaining, each of which is nothing more than argument over the extent of the rights that remain with boards after compliance with bargaining legislation has occurred. These cases will be reviewed in subsequent sections; here, only the interaction between bargaining and other laws not directly derived from board's exclusive legislative powers will be discussed.

When collective bargaining and other statutes differ, there is general agreement with the Michigan court that found that "[w]hen there is conflict between PERA and another statute, the PERA prevails, diminishing the conflicting statute, *pro tanto*."[68] In a well-known and often-cited case in New Jersey, charges of racial discrimination in the appointment of a teacher to an extra-duty assignment were found to be controlled by and under the exclusive jurisdiction of the state's Division on Civil Rights. Advisory arbitration, however, was recommended.[69] In Kansas, provisions regarding notice for reduction in force decisions conflicted with the statutes and, thus, were found void.[70]

Nevertheless, agreements forged under collective bargaining statutes that are found to be at variance with preexisting laws may be upheld. The courts frequently find that modification of the statute is implicitly authorized by the enabling legislation, such as in Iowa and Illinois where the agreements were found to be controlling. (However the five-to-four decision and extensive discussion revealed the Iowa court's discomfort with the proposition.)[71] A provision of a city charter authorizing the school board to discharge employees "at its pleasure" was not sufficient to exempt a Massachusetts board from being required to bargain with a union over procedures to utilize in implementing unexpected layoffs not contemplated by the extant agreement. This court captured the essence of the matter when it commented that "[w]e do not attribute to the Legislature an intention to pass a largely ineffective collective bargaining statute as to public school employees .... The general discretion to act which school committees have is limited by their obligation to bargain stated in [the statutes]."[72]

---

[67] Ogilvie v. Independent School Dist. No. 341, 329 N.W.2d 555 (Minn. 1983).

[68] Parks, *supra* note 8, at 647; Lincoln, *supra* note 26; Hotel, Motel, Restaurant Employees and Bartenders Union Local 737, AFL-CIO v. Escambia Cty. School Bd., 426 So. 2d 1017 (Fla. Dist. Ct. App. 1983).

[69] Teaneck Bd. of Educ. v. Teaneck Teachers' Ass'n, 462 A.2d 137 (N.J. 1983).

[70] Ottawa Educ. Ass'n v. Unified School Dist., 666 P.2d 680 (Kan. 1983).

[71] Shenandoah Educ. Ass'n v. Board of Educ., Shenandoah Commun. School Dist., 337 N.W.2d 477 (Iowa 1983); Board of Educ., Bremen Commun. High School Dist. No. 228 v. Bremen Dist. No. 228 Joint Faculty Ass'n, 449 N.E.2d 960 (Ill. App. Ct. 1983).

Certain statutes that are quite independent of collective bargaining legislation impinge on negotiations and contract implementation. Confidentiality of personnel records, for example, became an issue in Connecticut where a district denied a union's request for extensive personnel data to prepare grievances over the appointment of its members to selected positions. Though the court granted the access requested, it noted that such right extended *only* to relevant information related to appropriate union concerns. Quoting an earlier decision, the court reviewed the established parameters:

> Although a union has the right to relevant information, that right can be subject to countervailing privacy interests. *Detroit Edison* decided that the employer's duty to provide relevant information does not extend to validated psychological aptitude tests or to the scores of individuals taking such tests. It concluded that serious consideration of privacy outweighed the union's need for the information and justified the union's need for the information and justified conditioning the disclosure of the test scores on the examinees' consent. The sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice.[73]

Collective bargaining practices sometimes come into conflict with provisions of open meeting laws, especially where the statues do not clearly exempt or include them. In Tennessee, the state's sunshine law was found to prevent a board from meeting privately with its attorney and chief negotiator; attorney-client privilege was found insufficient to obviate the requirements of the Act.[74] Similarly, in Texas, a permanent injunction was affirmed restraining district officials and board members from conducting meetings and public business by telephone. The San Antonio Teachers' Council had brought the action initially.[75]

---

[72] Newton, *supra* note 53, at 1[illegible]8.

[73] West Hartford, *supra* note 64, at 1260.

[74] Anderson, *supra* note 62.

[75] Elizondo v. Williams, 643 S.W.2d 765 (Tex. Civ. App. 1982).

Legislation regarding school funds, particularly that either limiting a school board's capability to levy taxes or preventing deficit budgeting, comes into conflict with negotiated salary settlements from time to time. The issue is complicated in districts, such as Boston, where the city, not the Boston School Committee, provides the money for the schools, and the city political leaders follow strict "reduce the costs of government" platforms. There, last year's court decision requiring the city to fund the salary increases in a three-year agreement did not put all issues to rest. Because the mayor was determined to reduce the cost of government, he put great pressure on the school administration to help by reducing the school budget, which they did. In 1983 the city was back in court as a result, as the court described it, of "mayoral blandishments" having been successful in getting the school committee to reduce its request for money not allocated to teacher salaries. The union filed suit, claiming that the reduction would reduce the base for future school district funding. The court was unsympathetic, finding that the claims had "nothing to do with the executed bargaining agreements, but had to do with the future." Accordingly,

> the rights of the union in this matter are contractual in nature. It is a doubtful proposition, once the pay package of a collective bargaining agreement has been funded, as has occurred in this case, that the contractual bundle of rights for which the unions may press includes improving the economic environment for the next round of negotiations.[78]

However, in Pennsylvania, the Philadelphia City Council's failure to fully fund the school system's budget portended a $60 million deficit. The district took certain unilateral actions to eliminate it, including rescinding a wage increase and deleting certain fringe benefits, claiming that availability of funds was a "condition precedent" to performance of its contractual obligations. The union grieved the actions and both an arbitrator and a trial court ordered the district to restore the recissions. Although the commonwealth court reversed, the supreme court restored the trial court's original decision because,

> [i]n the instant case, we find that the District was required to establish impossibility of performance and failed to do so in the absence of a showing that it attempted performance by all possible means. Furthermore, there is nothing in the agreement stating that a balanced budget or any particular level of funding is a condition precedent to the payment of the agreed

---

[78] Boston Teachers' Union, Local 66 v. Mayor of Boston, 451 N.E.2d 1169, 1173 (Mass. App. Ct. 1983).

> on salary and benefit increases. We find that the District had a duty to make such provision in the agreement if it wished to be excused.[77]

In sum, the burden of proof was on the district to show that the condition precedent did not exist.

The identical problem arose in Indiana and resulted in a similar outcome, with the appellate court upholding a trial court's ordering a district to implement the salary schedule of the ratified bargaining agreement despite claims of fiscal inability to do so.

> The Board of Trustees for the South Bend school did not clearly establish where its budget cuts were implemented. The Trustees made nothing more than a bald statement that they had made all feasible budget cuts, and the only expense remaining to be cut was the teachers' own salaries. The expenses of the teachers' salaries are a portion of the general fund. This general fund also covers numerous other expenses including equipment, maintenance, extracurricular activities, and other miscellaneous items. No attempt was made by the Trustees to prove which areas of the budget were cut. In this light it cannot be said that the Trustees proved that the teachers' contract was *the expense* within the general fund which "provides for deficit financing."[78]

A broad constraint placed on collective bargaining by legislation prohibiting various kinds of discrimination was established by a federal court in Connecticut. It found that strong federal constitutional and statutory policies against discrimination invalidated a "hold harmless" clause in an agreement to the extent that it would have required the union to pay the damages won in a gender discrimination suit arising from the district's having followed the agreement's provisions. In an interesting rationale, which seemed well calculated to be supportive of the union's treasury, the court reasoned as follows:

> It is true that unions, as well as employers, are prohibited from discriminating against employees by reason of sex and may be independently liable for discrimination. In that sense, allowing the unions here to bear the full economic impact of the Board's settlement of the claims of the five individual plaintiffs does not conflict with that policy, particularly when, as here, SEA [the union] apparently actively sought the discriminatory pay provision. Nevertheless, if the "hold harmless" clause is

---

77. Brotherhood of Firemen and Oilers, Local No. 1201, AFL-CIO v. Board of Educ., School Dist. of Philadelphia, 457 A.2d 1269, 1271 (Pa. 1983).

78. South Bend Commun. School Corp. v. National Educ. Ass'n, South Bend, 444 N.E.2d 348, 352 (Ind. Ct. App. 1983).

> enforceable, employers will have little reason to be concerned over whether labor agreements discriminate against women, knowing full well that if they are later found to have discriminated, they will be totally compensated for any injuries resulting from the discrimination. Labor unions, on the other hand, will have little incentive to pursue antidiscrimination claims or lawsuits when they are aware they will have to pay from their own pockets for the fruits of victory . . . . [T]he logical reason why the contract contained a "hold harmless" clause was because at least one of the parties (probably the Board) thought that there was a good chance that the pay schedule in the Agreement would be held discriminatory. This seems particularly true here since the "hold harmless" clause appears in the same article of the contract that incorporates the discriminatory pay schedule. To allow the Board to collect from the two unions would be to fully indemnify the Board for what was partly its own wilful misconduct, the effect of which was the commission of a civil wrong against a third person or persons.[79]

3.5c Proposals Within Mandatory Scope of Bargaining

In one jurisdiction or another, virtually every conceivable interaction that can occur between a board and its employees seems to have been found mandatorily bargainable despite the well-recognized principle that boards may not redelegate or surrender any of their legislative powers. Consequently, a topic-by-topic listing of what is bargainable would be difficult to compile and would be much less enlightening than lengthy. Even so-called prohibited subjects of bargaining are not exempt from the negotiations table because of the widespread application of the "impact" theory of bargainability. The theory means, according to the language of a Florida PERC ruling that was adopted without change by a Florida Appeals Court, that "*it is the effects of the decisions and not the decisions themselves* which are mandatorily negotiable."[80] When these effects are grieved it may be impossible for an arbitrator to avoid reviewing the justification for the original decision and, at this point, the differences between mandatory, permissive, and prohibited topics become quite less distinct than they appear in the language of legislation and court decisions.

In Kansas, a court attempted to keep the matter clear by defining mandatory topics as those that (1) are "significantly related" to a condition of employment and (2) would not "unduly interfere" with management rights. In the case at hand, the court found that salary allocations for employee travel, criteria for promotion, selection of faculty to teach in summer school, procedures for achieving tenure, procedures for reduction in force, and employee access to their own personnel files at the university were mandatory topics of bargaining. The regents were found to retain the right to determine (1) who was to be promoted (after negotiated criteria and procedures were met); (2) whether to have summer school and what offerings to provide therein; and (3) when reduction in force was necessary.[81]

---

[79] Stamford Bd. of Educ. v. Stamford Educ. Ass'n, 697 F.2d 70, 73-74 (2d Cir. 1982).

[80] Hillsborough Classroom Teachers' Ass'n v. School Bd. of Hillsborough Cty., 423 So. 2d 969, 970 (Fla. Dist. Ct. App. 1982).

In California, the PERB had found that allocation of time during the teachers' workday between instruction, rest, and preparation was a proper topic of bargaining. The district's appeal was not on the particular items, per se, but was based on the allegation that the PERB, in general, was not authorized to develop and utilize a procedure for determining negotiability because of a "zipper" clause in the legislation that reserved "all matters not specifically enumerated" to board discretion. The court disagreed, approving, for that jurisdiction, the following three-step test that the PERB had developed to determine bargainability:

> A subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages, or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission.[82]

An employer in Pennsylvania who invoked such a "zipper" clause as sanction for refusing to bargain on assignment of summer school employees and unilaterally imposing an employee parking fee was equally unsuccessful. The court ruled that "a union's waiver of the right to bargain on mandatory subjects during the term of an agreement will not be found in a boiler plate waiver clause alone." It similarly found past practice as insufficient to permit the employer to unilaterally impose a ban on smoking at the workplace in a nonschool setting.[83]

---

[81] Kansas Bd. of Regents v. Pittsburg State Univ. Chapter, Kansas National Educ. Ass'n (Kan. No. 54,528, 1983) ¶37,804, *supra* note 17 at 39,639.

[82] San Mateo City School Dist. v. Public Employment Rels. Bd., 663 P.2d 523, 528 (Cal. 1983).

[83] Pennsylvania v. Pennsylvania Labor Rels. Bd., 465 A.2d 116, 118 (Pa. Commw. Ct. 1983); and *Id.*, 467 A.2d 1187, 1191 (Pa. Commw. Ct. 1983); both citing a previous decision, *Id.*, 459 A.2d 452, 457 (Pa. Commw. Ct. 1983).

Courts in other jurisdictions generally follow a similar track and either approve of employment relations boards' standards or fashion their own for deciding bargainability. Impact bargaining, for instance, when applied to layoff actions resulted in the following: *whether* to reduce in force is an exclusive management right, but *how to select and compensate* those affected is mandatorily negotiable.[84] Even a union that did not wish to do so was required to bargain the latter.[85] In Florida a list of topics over which the employer proposed to exercise unilateral control was required to be disclosed and bargained.[86]

Topics found to be not mandatorily bargainable (and, usually, by implication, permissive) included transfer and reassignment of a high school administrator to an elementary school where the action was not covered by the agreement and where compensation was not found to be substantially affected.[87] In Michigan, provisions and status of an agreement that required, inter alia, the district to bargain pension and retirement systems were found not to require bargaining over a district's unilaterally adopted practice of permitting certain retired teachers to work for the district up to twenty-five days per year to supplement their incomes. The fact that the retirees were found not to be performing work normally done by members of the bargaining unit was found to foreclose the association from grieving the matter, although the court noted that if such a practice took the form of contracting for bargaining unit work or became an incentive to early retirement that altered terms and conditions of employment, it would be mandatorily bargainable.[88]

3.5d Proposals Within Permissive Scope of Bargaining

Though the traditional triad of mandatory-permissive-prohibited for sorting topics of bargaining is widely applied, the New Jersey Supreme Court ruled that "New Jersey has only two categories of subjects of public employment negotiations: 'mandatorily negotiable terms and conditions of employment' and 'non-negotiable matters of government policy.' "[89] This test may broaden rather than constrict the parameters of bargaining because topics that in some jurisdictions would be classified as permissive would inevitably fall into New Jersey's mandatory category.

---

[84] Newton, *supra* note 53; Shenandoah, *supra* note 71.

[85] Saydel Educ. Ass'n v. Public Employment Rels. Bd., 333 N.W.2d 486 (Iowa 1983).

[86] Palm Beach Junior College Bd. of Trustees v. United Faculty of Palm Beach Junior College, 425 So. 2d 133 (Fla. Dist. Ct. App. 1983).

[87] Plainfield Ass'n of School Adm'rs v. Board of Educ., Plainfield, 453 A.2d 549 (N.J. Super. 1982).

[88] West Ottawa Educ. Ass'n v. West Ottawa Bd. of Educ., 337 N.W.2d 533 (Mich. Ct. App. 1983).

[89] Teaneck, *supra* note 69, at 139.

A state of Washington court found that granting association employees released time for pursuing association business was a permissive topic of bargaining and, hence, endorsed the practice over the claim of the state auditor who challenged the practice as constituting an agreement beyond the statutory authority and being unlawful gift of public funds.[90] In Florida an association was permitted to refuse to bargain on the employer's proposition to include a clause in the agreement stating that the employees' group would waive the right to bargain over the implementation of management prerogatives (an attempt to forestall the expansion of topics through impact bargaining?).[91]

No other cases were reported where clearly permissive topics of bargaining were explicated. Perhaps the growth of "impact" bargaining has resulted in this change.

3.5e Proposals Within Prohibited Scope of Bargaining

Despite the apparent encroachment on management prerogatives that impact bargaining connotes, several decisions reaffirmed the proposition that certain topics may not be bargained. Though it scarcely bears repeating because it is so broadly general as to be hopelessly meaningless in prospective application, no court has explicitly weakened the standard that a school board may not bargain away its legislative grant of authority to establish school policy and manage the schools. Decisions that recognized this principle at specific points of application found the following either to be prohibited topics of bargaining or proper exercise of management prerogatives: (1) whether to lay off employees;[92] (2) whom to promote;[93] (3) when transfers are required;[94] (4) class size and minimum staffing levels;[95] (5) decisions to discharge;[96] (6) the school calendar;[97] (7) which classes to offer;[98] and (7) whether to grant tenure.[99]

---

[90] State *ex rel.* Graham v. Northshore School Dist. No. 417, 662 P.2d 38 (Wash. 1983).

[91] Palm Beach, *supra* note 86.

[92] Brotherhood, *supra* note 77.

[93] Kansas, *supra* note 81.

[94] Plainfield, *supra* note 87.

[95] Hillsborough, *supra* note 80.

[96] Goetz, *supra* note 14.

[97] Eastbrook Commun. Schools Corp. v. Indiana Educ. Employment Rels. Bd., 446 N.E.2d 1007 (Ind. Ct. App. 1983).

[98] West Ottawa, *supra* note 88.

[99] Board of Educ., Carroll City v. Carroll City Educ. Ass'n, 452 A.2d 1316 (Md. Ct. Spec. App. 1982).

3.5f Terms of Collective Bargaining Agreements

Some cases arise where the primary issue is disagreement on the meaning of contract language, per se. Probably the most extensive discussion of terms of agreements occurred in Connecticut and California cases where the extent of "zipper" clauses was tested. In each instance it was found to be less encompassing than the employers had hoped. In the former state, the "hold harmless' clause was held insufficient to insulate the board from liability for contract-derived violations of civil rights. In the latter, a general management rights clause was not sufficient to reserve to the board's unilateral prerogatives all topics not specifically enumerated in the statutes.[100] In Florida, the employer's insistence on contract language requiring the union to waive, in advance, all rights to bargain over implementation of reserved management prerogatives was found to be an unfair labor practice.[101] In Illinois, language of the collective bargaining agreement that specifically bound the parties to comply with future laws made such legislation binding even where notice requirements of the agreement were thereby modified to the disadvantage of the employees.[102]

Language that stated that "the grievant and/or the Association" could pursue a grievance all the way to arbitration was interpreted in New York to mean that an individual teacher could invoke arbitration of a grievance over the expressed wishes of the association not to do so. In response to the union's claim that it held exclusive power to decide which grievances to arbitrate, the court answered that

> [t]his Court cannot find that each individual employee and union member, in becoming a beneficiary of the collective bargaining agreement between the Seneca Falls Central School District and Local 850, gave up to the union, as their respective representatives, the individual right to litigate their grievances to the contract. The only just and equitable interpretation to be afforded the particular arbitration clause used in the agreement must be construed as allowing the individual grievant-employee's rights to pursue their Demand to Arbitration without the union's endorsement.[103]

With a hint of pique, the court reviewed the term's various definitions in prior cases: "the abominable invention," "devoid of meaning" "incapable of classification by rules of grammar and syntax," "a grammatical monstrosity," and "confusing and should be condemned." Nevertheless, it concluded that the well-settled principle of contract law that prevents a person from taking advantage of "adroit and slippery language" compelled finding in this dispute that the term "and/or" plainly meant either party or both parties.[104]

---

[100] Stamford, *supra* note 79; San Mateo, *supra* note 82.

[101] Palm Beach, *supra* note 86.

[102] Krizek, *supra* note 22.

[103] *In re* Seneca Falls Cent. School Dist., 459 N.Y.S.2d 689, 693 (N.Y. Sup. Ct. Seneca Cty. 1983).

The importance of the terms of agreements was underscored by a decision in Pennsylvania wherein a court found that the best indicator of whether the parties did or did not intend to submit a matter to arbitration was the language of the agreement, not abstract considerations of employer rights. According to the court, "[s]hould an employer wish to exclude areas from arbitration, it should do so through the collective bargaining process rather than by asking the courts to rectify the employer's oversights and/or shortcomings in evidencing its intent through the collective bargaining agreement."[105]

3.6 GRIEVABILITY AND ARBITRABILITY

Generally speaking, courts consider grievability and arbitrability as being closely associated. Though it is unquestioned that if a matter is not grievable, it is not arbitrable, not all matters are grievable and not all grievable matters are necessarily arbitrable: the collective bargaining agreement, for instance, may foreclose arbitrable disposition of certain disputes. So also may statutes, the interpretations of which are beyond the reach of arbitrators, who are limited to interpreting terms of agreements.[106] A midground is reached from time to time, as in decisions that advise and give weight to advisory arbitration.[107]

3.6a Presumption of Arbitrability

Despite occasional decisions against it, a strong and consistent presumption favoring arbitration exists among the courts in all jurisdictions. So strong is it that the fact that the arbitrator could not grant the relief sought (creation of a new position and appointment of a teacher to it) was found not to preclude submission of the matter to arbitration. According to the court the arbitrator could, if warranted, fashion an alternative award that would be within the terms of the collective bargaining agreement.[108] An Iowa court extended the presumption into approving the arbitrability of decisions as to which teachers should be selected for layoff. It would not, however, extend so far as to have cases involving discharge subjected to the process.[109]

---

[104] *Id.* at 693, 694.

[105] East Pennsboro Area School Dist. v. Pennsylvania Labor Rels. Bd., 467 A.2d 1356, 1361 (Pa. Commw. Ct. 1983).

[106] Teaneck, *supra* note 69; Seneca Falls, *supra* note 103; Neshaminy Fed'n of Teachers v. Neshaminy School Dist., 462 A.2d 629 (Pa. 1983); Plainedge Fed'n of Teachers v. Plainedge Union Free School Dist., 460 N.Y.S.2d 502 (N.Y. App. Div. 1983); Board of Educ., Farmingdale Union Free School Dist. v. Farmingdale Fed'n of Teachers, 459 N.Y.S.2d 790 (N.Y. App. Div. 1983).

[107] Walker Cty., *supra* note 27; Teaneck, *supra* note 69; Plainedge, *supra* note 106.

In affirming the "broad presumption favoring arbitration," a Maine court found not only that the collective bargaining agreement contained the intention that dismissal of nonprobationary teachers was to be subjected to arbitration, but also that the statutes permitted such an agreement. The court distinguished between the relative risks inherent in broad scope interest and broad scope grievance arbitration as follows: "interest arbitration is a valid delegation only if accompanied by adequate standards or safeguards to protect against unfair and arbitrary decisions. . . . Grievance arbitration in the case before us, does not present a similar risk of policy-making without accountability."[110]

Arbitration was extended, in Illinois, to cover a dispute over whether a statutory grant of board prerogative to establish sick-leave policy was limited by the terms of the agreement. The court found that, "at the very least, the Board's new sick-leave policy presents a question of whether that new policy is compatible with the sick-leave provision in the agreement. Thus, we hold that the Board's unilateral change regarding its sick-leave policy presents an arbitrable issue."[111]

On the other hand, a New York court found the reasons for the dismissal of a nonprobationary teacher not arbitrable because "[i]t is beyond the power of a board of education to surrender its authority and responsibility to make the substantive determination of whether to grant tenure, and any contractual provisions which interfere with this nondelegable function are unenforceable as against public policy."[112]

3.6b Who Determines?

Resolution of questions as to who determines grievability and arbitrability is made by any of the three "third-party" adjudicators of disputes in typical collective bargaining arrangements—arbitrators, employment relations commissions, or the courts. Indeed, each one, by hearing and ruling on disposition of grievances and/or other disputes, implicitly rules on the primary questions of arbitrability and jurisdiction. A court in Oregon made this explicit when it commented that "with few exceptions, every court has the power, even the duty, to determine whether it has jurisdiction to decide the matter before it."[113] Three principles, each of which is heavily influenced by the presumption of arbitrability that pervades the entire process, are clear from decisions examining who should determine whether a topic is a proper subject of grievance and arbitration: (1) arbitrators are limited to interpreting the terms of collective bargaining agreements;[114] (2) if questions of law are implicated, the courts must decide;[115] and (3) if unfair labor practices are alleged, employment relations boards or commissions have original and sometimes exclusive jurisdiction.[116]

---

[108] Paloumpis v. Onondaga Commun. College Fed'n of Teachers, AFT Local 1845, 467 N.Y.S.2d 447 (N.Y. App. Div. 1983).

[109] Shenandoah, *supra* note 71.

[110] Cape Elizabeth, *supra* note 30, at 172.

[111] Board of Educ. of Arbor Park School Dist. No. 145, Cook Cty. v. Ballweber, 451 N.E.2d 858 (Ill. 1983).

[112] Board of Educ., Elwood Union Free School Dist. v. Elwood Teachers' Alliance, 461 N.Y.S.2d 891, 892, 893 (N.Y. App. Div. 1983).

Nevertheless, every possible dispute that can arise between employees and employers is not thereby deftly sorted. In many instances, the claims overlap so much that distinctions are blurred between arbitrability, per se, and the substance of the dispute. Further, jurisdictional overlap is exacerbated by the fact that employment relations boards and commissions are typically the first appellate level for all arbitrator decisions. When challenges do arise, according to a Wisconsin court, "the question of substantive arbitrability—whether the parties agreed to submit an issue to arbitration—is a question for the courts to decide."[117]

The difficulty of applying these three standards of arbitrability prospectively was illustrated in a California case wherein the court ruled that the state's PERB could (and should) rule on a challenge to the university's refusal to grant a union access to the internal mailing system, an expressed right given in the state's Higher Education Employer-Employee Relations Act. The problem had arisen because the peculiar nature of the mailing system resulted in both inhouse mail and the United States mail being carried over the same or similar routes, invoking postal regulations prohibiting private conveyance over any established United States Postal Service routes. Despite the clear statutory basis of the matter, the court, while conceding that the PERB was not empowered to determine whether the California statutory grant was preempted by federal postal law, found that the PERB could examine both in light of the complaint and attempt to harmonize them. Accordingly, it was not prevented from "*consulting* federal law in order to determine whether the state statute may be enforced without offending relevent federal regulations. An administrative agency still remains free to *interpret* the existing law in the course of discharging its statutory duties."[118]

---

[113] School Dist. No. 115, Clackamas Cty. v. Oregon School Employees' Ass'n, Chapter 66, 669 P.2d 821, 823 (Or. Ct. App. 1983).

[114] Neshaminy, *supra* note 106.

[115] Bailey v. Ferndale Area School Dist., 454 A.2d 207 (Pa. Commw. Ct. 1982).

[116] *In re* Jefferson Twp. Educ. Ass'n, 457 A.2d 1172 (N.J. Super. Ct. 1982).

[117] Whitewater Educ. Ass'n v. Whitewater Unified School Dist., 335 N.W.2d 408, 410 (Wis. Ct. App. 1983).

In Florida, the PERC was found to have exceeded its authority when it rejected an arbitrator's determination that administrative witnesses were not credible, consequently rejecting their claim that certain nonrenewals were a legitimate exercise of management rights and finding that the actions were an impermissible retaliation for protected union activity. The mere fact, according to the court, that two contrary conclusions were plausible does not render the one selected incorrect.[119] Also in Florida, arbitrability was decided by the terms of an agreement that gave the certified bargaining agent control over the decision to seek arbitration. When the unit "found that appellant's grievance lacked merit and refused to process it through the arbitration stage .... Appellant was thereby foreclosed from arbitration."[120]

The PERC in New Jersey was permitted to refer an allegation of unfair labor practices to a hearing officer for gathering evidence and even to make a recommendation, but could not submit resolution of the matter to binding arbitration. The commission, itself, had found the dominant issue to be discrimination for participating in association activities, which made the matter an unfair labor practice charge and, therefore, within the exclusive jurisdiction of the commission.[121]

In Missouri, an appellate court distinguished between *contested* and *noncontested* cases under the state's judicial procedures in determining its own authority to dispose of appeals. For cases in the former classification, it found that

> [t]he agency determines the facts, an exercise not only judicial but also mingled with legislative [or executive] discretion and expertise. To maintain the integrity of that mixed administrative function, and to avoid an unlawful encroachment, therefore, the court of appeals reviews the administrative decision—and not that of the circuit court which has no power to find the facts—for legal sufficiency and lawfulness. For

---

[118] Regents of the Univ. of California v. Public Employment Rels. Bd., 189 Cal. Rptr. 298, 301 (Cal. Ct. App. 1983).

[119] F.U.S.A., FTP-NEA v. Hillsborough Commun. College, 440 So. 2d 593 (Fla. Dist. Ct. App. 1983).

[120] Galbreath, *supra* note 57, at 838.

[121] Jefferson Twp., *supra* note 116.

> that very reason, the court of appeals may not find a fact neglected by the agency, but essential to decision but must remand to the agency for that exercise of exclusive jurisdiction.[122]

In the case at hand, however, which it classified as *noncontested*, the court reversed the trial court's judgment against an employee because certain facts germane to the decision had been overlooked. It found authority to rule based on the overlooked evidence because

> [i]n a *noncontested* case, the circuit court and not the administrator adjudicates the evidence, and the facts found are a product of a judicial function only without mix of legislative or other governmental considerations—an exercise interdicted to a court. The court of appeals reviews the judgment of the circuit court—both as to the law and evidence components, and not the decision of the administrative body. In such a case, where the review shows that the findings of the circuit court neglects [sic] a fact essential to judgment, the judgment does not rest on substantial evidence and may not stand.[123]

A trial court's finding that the management rights clause in an agreement foreclosed an arbitrator from ruling on a challenge to the reassignment of a teacher was reversed by an appellate court, which found that the issues raised went to the "merits" of the grievance more than to considerations of reserved management rights. Disposition of the issue, therefore, was the exclusive domain of the arbitrator and could not be ruled on further by the courts.[124]

Jurisdictional bounds were not permitted to foreclose an employee from litigating as well as receiving arbitration in a mixed-charge allegation in Massachusetts. The teacher had filed for arbitration and found that the collective bargaining agreement did not provide for arbitration of her particular grief (demotion). Inasmuch as state laws were implicated in the definition of her status, her suit for redress was entertained over the objections of the school committee that her original election of arbitration was conclusive. In affirming her reinstatement by a trial court, the appellate court noted that "the election mentioned [in the statutes] assumes a collective bargaining agreement that allows the particular resort to arbitration, not one that repels it. The [trial] judge saw the anomalous and unfair consequences in the present case of a contrary view."[125]

---

[122] Phipps v. School Dist. of Kansas City, 645 S.W.2d 91, 99 (Mo. Ct. App. 1982).

[123] *Id.* at 100.

[124] West Shore Educ. Ass'n v. West Shore School Dist., 456 A.2d 715 (Pa. Commw. Ct. 1983).

[125] Fogarty v. School Comm. of Palmer, 448 N.E.2d 783, 785 (Mass. App. Ct. 1983).

In a California case, an exclusively statutory dispute regarding overtime and holiday calculations due four-day-week employees was found to be proper for judicial disposition. An order was issued in their favor, including instructions for the trial court to determine damages (backpay) due.[126] Where the record was ambiguous as to whether the issue was a matter of law or interpretation of an agreement, a New York court returned a question regarding retroactive pay to the arbitrator for clarification on whether he considered his award binding or advisory.[127]

Exclusivity of jurisdiction varies according to differing states' legal context for bargaining. In Washington, where the PERC asserted exclusive jurisdiction over unfair labor practices, the court disagreed, revealing that it was unable to find such limitation in the statutes:

> Every administrative agency must interpret the law in order to enforce or to follow it. it is a quantum leap in logic, however, to jump from the fact that PERC is empowered to prevent unfair labor practices to the conclusion that PERC is the exclusive decider of public labor law questions.[128]

Three cases in West Virginia found that the state superintendent of schools was a proper source of review for grievance rulings of county boards of education.[129] With some impatience, an Indiana court, affirming a trial court decision finding that a statute forbidding deficit financing did not, thereby, permit a district to change unilaterally the wage and benefits provisions of a signed collective bargaining agreement, made the following comment on jurisdiction: "A complainant who seeks the jurisdiction of the court cannot be heard to complain that the court lacks jurisdiction in the matter when the justice rendered is not to the complainant's satisfaction."[130]

3.6c Remedy as a Factor in Arbitrability

Occasionally a case focuses on the remedy before the award is granted. Here, as in other challenges to arbitrators' decision, the broad commitment that exists to support the outcomes of arbitration places a heavy burden of proof on those who seek exemption from an arbitrator's award. A decision in New York illustrates this point. In approving an award that established a formula for additional teacher pay due because of increases in class size, the court commented that an arbitrator "may do justice and the award may well reflect the spirit rather than the letter of the agreement."[131]

---

[126] California School Employees' Ass'n v. Oakland Unified School Dist., 190 Cal. Rptr. 464 (Cal. Ct. App. 1983).

[127] Farmingdale, *supra* note 106.

[128] Graham, *supra* note 90, at 43.

[129] State *ex rel.* Board of Educ., County of Wood v. Truby, 300 S.E.2d 109 (W. Va. 1983); State *ex rel.* Board of Educ., County of Wyoming v. State Superintendent of Schools, 300 S.E.2d 108 (W. Va. 1983); State *ex rel.* Board of Educ., Kanawha Cty. v. Truby, 301 S.E.2d 862 (W. Va. 1983).

[130] South Bend, *supra* note 78, at 351.

A clear-cut prospective ruling on a remedy prior to its having been awarded occurred in the same state. The issue arose when the relief sought was for the arbitrator to create a new position and then assign the grieving teacher to it, action clearly beyond arbitral powers. In ordering the dispute, nevertheless, to proceed to arbitration, the court ruled as follows:

> That the arbitrator cannot necessarily grant the relief requested does not preclude submission of the dispute to arbitration. Arbitrators have broad powers to fashion relief and a court, in deciding an application for a stay, should not assume in advance that the remedy granted will be an impermissible one. The dispute, therefore, should proceed to arbitration and, if an award is warranted, for the fashioning of such an award as is permitted by the collective bargaining agreement.[132]

Nevertheless, where the demand for arbitration challenged as "arbitrary and capricious and without just cause" a board's denial of tenure to a teacher, the court found the matter nonarbitrable because that language too closely implicated the substantive validity of the reasons given. The court distinguished between this and the specificity of reasons given, however, and remanded the dispute and whether or not contractual processes had been met to arbitration.[133]

3.6d Procedural Issues

The importance of proper procedures that characterize formal judicial proceedings has been transplanted into the administrative hearings that initially consider much, if not most, of the employer-employee disputes that are referred to formal third-party disposition. The strictness of the standards, however, is relaxed somewhat, with appellate judges typically focussing more on labor relations laws' intentions to resolve differences at the lowest possible, nonlitigious level, rather than on overly strict adherence to procedural requirements, particularly where employee security or direct economic interests are at stake. For instance, not returning their executed contracts until five days (during three of which the schools were closed) after the statutory deadline was held insufficient to trigger automatic presumption of resignation for two teachers. The court based its confirmation of an arbitrator's restoring them on three principles: (1) resignation must be, according to law, a voluntary, conscious, deliberate act—it cannot be the product of minor oversight; (2) there was no adverse impact on the employer; and (3) the employer itself had missed statutory deadlines in its tendering of the documents.[134] (See discussion of the "clean hands" doctrine in section 3.4c.)

---

[131] Board of Educ. of Dover Union Free School Dist. v. Dover-Wingdale Teachers' Ass'n, 467 N.Y.S.2d 270, 273 (N.Y. App. Div. 1983).

[132] Paloumpis, *supra* note 108, at 448.

[133] Elwood, *supra* note 112.

A New York court treated timeliness similarly, though finding against the teachers, who charged that the employer's notification of their dismissal was void because it had been delivered prior to day twenty of a twenty-day statutory requirement. In reversing its earlier ruling that the requirement in the statute meant *twenty* days, neither more nor less, the court conceded that

> [w]e have previously held such a defect to be jurisdictional, requiring dismissal of the proceeding unless waived, but further analysis compels us to abandon such a rigid rule. . . . That the Legislature did not intend the 20-day notice requirement to be inflexible is readily apparent from its provision for shorter notice by order to show cause. Moreover, due process requirements are satisfied as long as respondents received notice reasonably calculated, under all the circumstances, to apprise them of the proceeding and afford them an opportunity to defend. Accordingly, where, as here, respondents are properly served with the petition and notice of petition, the better rule, and the one which we now adopt, treats a return date which does not meet the 20-day requirement of [Civil Practice Law and Rules] as a defect or irregularity which, pursuant to [them,] shall be disregarded in the absence of substantial prejudice to a party.[135]

Timeliness requirements cannot be ignored with impunity, however. In New York and Iowa, teachers' failure to meet filing requirements of the grievance procedures and education law foreclosed their bringing court action to recover for having been suspended and terminated.[136] But this is far from absolute. According to a Pennsylvania court, which rejected the district's claim that an arbitrator's award should be revoked because the grievance was filed after the fifteen-day time limit set forth in the agreement,

---

[134] Whitewater, *supra* note 117.

[135] Brown v. Casier, 469 N.Y.S.2d 165, 167, 168 (N.Y. App. Div. 1983).

[136] Alderstein v. Board of Educ., City of New York, 466 N.Y.S.2d 973 (N.Y. App. Div. 1983); Feree v. Board of Educ., Benton Commun. School Dist., 338 N.W.2d 870 (Iowa 1983).

> [w]here, as here, there is no limitation in the Agreement prohibiting an arbitrator from deciding procedural issues, our Supreme Court has refused to upset an arbitrator's resolution of such issues even where such resolution involves an arbitrator's finding that a grievance filed *after* the time limitation stated in the Agreement is nevertheless arbitrable.[137]

Procedural actions on the part of either party may, under certain circumstances, constitute a waiver of right to arbitration. In denying a teachers' association access to arbitration after its having lost on certain aspects of a reinstatement and salary placement claim in a civil suit, the court found that

> [a] party can waive his right to arbitration by deliberate election to proceed with a court action for the determination of his claim. Here, the grievants and others elected to pursue their claims through the courts. By participating in those earlier proceedings, although on behalf of others than the grievants, the teachers' association waived its right to submit the contractual salary dispute to arbitration.[138]

A district in Rhode Island, which filed for arbitration just two days prior to trial after having prepared for litigation for over two years, was deemed to have waived the right to administrative disposition of the issue.[139]

On the other hand, teachers in Massachusetts and Iowa were permitted to litigate after arbitration had been elected.[140] In the Iowa case, where dismissal of a teacher was at stake, no less than three parallel sets of hearings had occurred. The supreme court, while finding that arbitration of termination decisions was an impermissible violation of legislative intent, felt that

> [i]t is extremely unfortunate that the parties here struggled through so many hearings and procedural difficulties leading up to this decision on the merits. Concurrent or parallel grievance procedures and statutory appeal proceedings should be avoided by public employers, their employees and collective bargaining organizations whenever possible. We recognize that under some circumstances more than one evidentiary hearing on multiple factual and legal issues pertaining

---

[137] Pittston Area School Dist. v. Pittston Area Fed'n of Teachers, Local 1590, 456 A.2d 1148 (Pa. Commw. Ct. 1983).

[138] East Ramapo Cent. School Dist. v. East Ramapo Teachers' Ass'n, 457 N.Y.S.2d 558, 560 (N.Y. App. Div. 1983).

[139] North Smithfield Teachers' Ass'n v. North Smithfield School Comm., 461 A.2d 930 (R.I. 1983).

[140] Fogarty, *supra* note 125; Shenandoah, *supra* note 71.

> to teacher termination may be necessary. Here, however, much duplication of effort could have been avoided.[141]

In two cases during the year, districts were found to have waived their rights to judicial review of arbitration awards by procedural defects. In both cases they had failed to contest arbitrability during initial hearings.[142]

The procedural defect most frequently charged is that one or the other of the parties failed to exhaust all administrative remedies prior to litigating. The general rule is that if the claim is related (defined broadly) to the agreement, grievance arbitration procedures must be exhausted prior to obtaining a court hearing.

Further, the doctrine of collateral estoppel typically binds disputants to whatever decision they receive first, so long as the agency (or court, for that matter) rendering it does so without error. For instance, the doctrine bound an arbitrator in Connecticut to a decision of the state's Labor Relations Board that paying union administrators who were displaced into the teachers' union salaries larger than the teachers' schedule would have brought did not implicate the teachers' union sufficiently to allow it to grieve the matter. The matter was complicated by the fact that the pay was calculated pursuant to the agreement the board had with the administrators' union. Parallel claims had been filed before both the arbitrator and the LRB, with the two handing down exactly opposite rulings.[143]

Where both teachers and boards failed to exhaust appropriate administrative procedures, they were required to do so prior to receiving court adjudication, even in issues regarding interpretation of state statutes regarding professional status, pay owed, and a constitutional claim arising from alleged transfer due to union activity.[144]

Nonetheless, two teachers in New York were permitted to seek judicial review of their claims of improper salary increases in a new assignment and unjustified disciplinary salary penalties, where the relief sought was mandamus and the statutes specifically provided for judicial disposition of that writ. The dispute had arisen when the district reassigned a teacher, preventing him and his spouse from riding to work together. Their response to the action included unauthorized tardiness and absences, leading the district to impose disciplinary salary deductions. The penalties were found to be permitted by the agreement, but the district's refusal to pay for additional time required in the new assignment was not upheld.[145] On the other hand, a district's request for judicial review of an administrative commission's decision was denied in Kansas because of a procedural defect. The court found the commission's order technically "not yet final" and, hence, not reachable by judicial declaratory ruling.[146]

---

[141] Shenandoah, *supra* note 71, at 482.

[142] West Shore, *supra* note 124; Otselic Valley Cent. School Dist. v. Otselic Valley Teachers' Ass'n, 458 N.Y.S.2d 329 (N.Y. App. Div. 1983).

[143] New Haven Bd. of Educ. v. New Haven Fed'n of Teachers, Local 933, 462 A.2d 389 (Conn. Super. Ct. 1982).

[144] Racunas v. Ringgold School Dist., 452 A.2d 917 (Pa. Commw. Ct. 1982); Schussel v. Weinberger, 562 F. Supp. 819 (D. Mass. 1983); Muldrow v. Pinkley, 436 So. 2d 288 (Fla. Dist. Ct. App. 1983).

3.6e Management Prerogatives as a Bar

Despite the presumptions of arbitrability discussed in sections 3.5 and 3.6, boards still retain broad grants of nondelegable discretionary authority that have not been limited by enabling legislation providing for collective bargaining. Inasmuch as the inherent law right of boards, as employers, to control their employees is precisely the domain of highest employee interest and sensitivity, both labor legislation and employee practice are aimed directly at placing limits on the unrestricted exercise of this power. It should occasion no surprise, therefore, that this awareness leads both parties to attend carefully to perceived encroachments of the other. Frequently these perceptions are mutually exclusive; more than few of them result in litigation.

Management rights were upheld in a number of such cases; even where the decisions went against the district's action, courts usually reaffirmed at some length the existence of nondelegable rights. In an Idaho case, for instance, the supreme court upheld a trial court's finding of sufficient evidence to impute to the board a change in practice that required bargaining. Despite the ruling, the court stated that "[o]nly a Board of Trustees of a school district can adopt policies for a district."[147] The board had argued unsuccessfully that attaching to individual teacher contracts provisions of employment that were different from the collective bargaining agreement had the effect of changing it.

Two decisions affirmed exclusivity of board control over the curriculum: one found nonbargainable the board's decision to move behind-the-wheel drivers' education to outside of the regular school hours, and the other found the board's decision to drop a dance course not mandatorily bargainable.[148]

---

[145] Saltz v. Board of Educ., City of New York, 461 N.Y.S.2d 692 (N.Y. Civ. Ct. 1983).

[146] Unified School Dist. 251 v. Secretary, Kansas Dep't of Human Resources, 661 P.2d 1248 (Kan. 1983).

[147] Robinson v. Joint School Dist. No. 331, 670 P.2d 894 (Idaho 1983).

[148] Parsippany-Troy Hills Educ. Ass'n v. Board of Educ., 457 A.2d 15 (N.J. Super. Ct. 1983); West Ottawa, *supra* note 88.

The board's right to terminate a science teacher due to lack of curricular need for his services was upheld against a department of public instruction's recommendation that the school's science program be expanded and charges that the required hearings were biased because three board members who had participated in the initial hearing also participated in a rehearing. The court found the charges of bias to be merely "unfounded belief" and, in accepting an administrative proceeding's finding on the merits, stated that

> [w]e will not second-guess the Board's decision not to follow the DPI recommendation in a policy area such as this. We adopt the adjudicator's conclusion in this regard as our own: "The adjudicator has no authority to decide which is the wiser policy. Iowa law leaves educational policy to school boards. On the other hand, this discretion is not a blank check to override the legitimate interests of teachers in job security. Accordingly, the test for the adjudicator is whether this policy choice was characterized by an abuse of discretion, was a clearly unwarranted exercise of discretion, or otherwise was arbitrary and capricious. In the adjudicator's opinion, though strong arguments can be made contravening the board's policy choice, that choice does not manifest such a lack of reasoned thought to come within the statutory language regarding abuse of discretion as to warrant reversal of the board."[149]

When a board in New York reduced its summer work force due to declining enrollment and automation of scheduling, a court found the actions within proper exercise of management rights and did not require the matter bargained.[150] A board's prerogatives were narrowly (three-two) upheld in a case where the board unilaterally and without compensation evicted the teachers' union from office space it was using without charge in a school building. The court, in supporting the district, expressed more concern about statutory proscriptions against use of public facilities by private parties than about the board's abstract right to reclaim property it had loaned. An interesting and vigorous dissent based on equal protection was lodged.[151]

On the other hand, where a board's reduction-in-force practices were found to violate the collective bargaining agreement, the arbitrator's award of reinstatement and back pay, including interest, was found not to impinge on management rights. The board had contended, inter alia, that the award improperly dictated the terms of what should, at most, be bargained.[152]

---

[149] Olds, *supra* note 25, at 772.

[150] Vestal Teachers' Ass'n v. Newman, 463 N.Y.S.2d 932 (N.Y. App. Div. 1983).

[151] *In re* Board of Educ., Connetquot Cent. School Dist., 459 N.Y.S.2d 624 (N.Y. App. Div. 1983).

Personnel actions of various kinds generate many disputes about the extent of management rights or, at least, the impact of their being exercised. Board prerogative to determine that a permanent substitute teacher was not covered by the collective bargaining agreement was upheld in New York. Despite its having adopted the recommendation of an advisory arbitrator, the board's decision was found to be its own and well within its own discretion.[153]

Boards' rights to assign teachers were challenged in four cases. In Illinois, requiring the board to arbitrate whether it had followed the procedures it had agreed to in the agreement was not barred as being an erosion of management prerogatives. Neither was the requirement that it submit to arbitration a question regarding its implementation of the agreement's requirements for assignment of teachers to substitute duty.[154] In Pennsylvania, arbitration of a board's practices in assigning teachers to extra duty was not found to encroach on its prerogatives, but in New Jersey, binding arbitration of the board's prerogative *not* to assign a teacher to an extracurricular assignment was barred by preemptive civil rights statutes.[155]

In Minnesota, the provisions of state law and a collective bargaining agreement combined to permit the board to assign, without bargaining, a teacher to part-time service in two districts, thus increasing his travel (it was arranged, however, within his duty day). The court reviewed an earlier decision in which it had examined at length the point at which impact bargaining would converge with management prerogatives and, thus, be barred.

> Impact upon the terms and conditions of employment of an inherent managerial policy decision to divest certain positions of administrative functions does not render the manner in which the basic decision is made a subject of mandatory negotiations. The criteria and procedure for carrying out a reduction in supervisory personnel was so inextricably interwoven with the inherent managerial policy decision concerning the organizational structure of the school district that requiring the school district to meet and negotiate which positions to divest of administrative functions would have required the school district to negotiate the basic decision—a matter of inherent managerial policy which it has no obligation to negotiate.[156]

---

[152] Newton, *supra* note 53.

[153] Plainedge, *supra* note 106.

[154] Board of Educ., North Palos Elem. School Dist. No. 117 v. Williams, 454 N.E.2d 773 (Ill. App. Ct. 1983).

[155] *In re* Wellsboro Area School Dist., 467 A.2d 1197 (Pa. Commw. Ct. 1983); Teaneck, *supra* note 69.

[156] Ogilvie, *supra* note 67, at 558.

The teacher's claim in this dispute was further weakened by the fact that the collective bargaining agreement was silent on the subject of transfers to out-of-district assignments.

Encroachment on management prerogatives was not permitted by a Pennsylvania court that refused to extend the language of an agreement providing for arbitration of disagreements over employee discipline to a case regarding dismissal.[157]

Two boards in Ohio were unsuccessful in convincing the state's supreme court that their having agreed to provide reasons for nonrenewal was unenforceable due to statutory grants of authority and limitations of certain notice dates.[158] Regarding the claim that the statutory provisions could not be modified by an agreement, the court stated:

> The mere fact that R.C. 3319.11 creates a statutory precondition to the non-renewal of a nontenured teacher's contract by requiring delivery of written notice on or before April 30 of the board's intention not to re-employ, does not preclude a board of education from guaranteeing that teacher additional procedural safeguards when termination is contemplated. Instead, R.C. 3319.11 should be viewed as a teacher's protection statute designed to provide minimum procedural safeguards. Thus, contractually created procedural requirements relating to nonrenewal, contained in collective bargaining agreements and arrived at through open negotiation, are enforceable so long as the procedures do not directly conflict with [the statute].[159]

A rather unusual award regarding nonrenewal was upheld in New York, where an arbitrator extended the probationary period for achieving tenure one year beyond the statutory provisions. Although the district had failed to comply with the evaluation procedures of the collective bargaining agreement, it argued that the award violated public policy by extending the probationary period. The court disagreed, finding that

> [t]he district's public policy argument is meritless. Contrary to the district's contention, the evaluation provision, as construed by the arbitrator, does not infringe upon any substantive aspect of the district's responsibility and authority to make tenure decisions. Rather, it merely imposes certain procedural

---

[157] Neshaminy, *supra* note 106.

[158] Tracy v. Otsego Bd. of Educ., 453 N.E.2d 610 (Ohio 1983); Struthers City Schools Bd. of Educ. v. Struthers Educ. Ass'n, 453 N.E.2d 613 (Ohio 1983).

[159] *Id.* at 615.

requirements which must be complied with before a probationary appointment can be terminated. Such bargained-for supplemental procedural steps preliminary to the final action of granting or withholding tenure are not violative of public policy.[160]

3.6f Tenure Issues

Teachers who have attained tenure whether via provisions of a collective bargaining agreement or by statute enjoy extraordinary protection against employer abrogation of the property interest their status affords them. These protections arise in two different contexts: (1) whether tenure exists for a particular teacher claiming it for the first time, and (2) how permanent is the protection of tenure against layoff or just-cause discharges.

Whether tenure had been attained was the issue in New York, where the court found that the substantive review of the board's reasons for denying tenure was not arbitrable but its compliance with procedures for determining that substantive decision was, including questions regarding the specificity of the charges cited.[161] In two New York cases, teachers attempted to achieve tenure status by claiming that tenure areas separate from those of the regular teaching staff had been established for them. One was denied her claim that the collective bargaining agreement in force at the time she had signed her letter of intent established her tenure area as K-12 reading specialist rather than in an elementary area. The court was unconvinced, ruling that the agreement in force at the time she actually began her employment was determinative of her status.[162] The claim of guidance teachers that their assignments constituted a separate tenure area was returned by the court to arbitration to determine whether provisions of the collective bargaining agreement would resolve the dispute.[163]

In Arkansas, teachers were denied their attempt to establish vested property interest and tenure protection by invoking, in the court's words, "the mere statutory requirement" that a district could not act arbitrarily in nonrenewal of teacher contracts.[164]

---

[160] Broadalbin Teachers' Ass'n v. Broadalbin Cent. School Dist., 469 N.Y.S.2d 217, 218 (N.Y. App. Div. 1983).

[161] Elwood, *supra* note 112.

[162] Horowitz v. Board of Educ., East Ramapo Cent. School Dist., 465 N.Y.S.2d 67 (N.Y. App. Div. 1983).

[163] Board of Educ., Porterville Cent. School v. Porterville Faculty Ass'n, 465 N.Y.S.2d 335 (N.Y. App. Div. 1983).

[164] Sutton v. Mariana School Dist., 573 F. Supp. 159 (E.D. Ark. 1983).

The extent to which tenure, once granted, survives against layoff or just-cause charges was tested on several occasions. (Extended discussion of discharge of tenured employees appears in chapter 2 of this volume; consequently, it will not be repeated here.) Two cases examined whether, under Massachusetts law, tenure survives layoff. Although all possible permutations of the rule were not covered definitively, the state's supreme court found that tenured teachers are entitled to restoration of tenure upon being recalled from layoff due to declining enrollment. Whether this also covers the case of dismissal for budgetary reasons is on remand to a trial court.[165]

A tenure issue arose in New York, where a tenure hearing panel had rejected a board's charges against a teacher pursuant to his dismissal. On appeal to the state commissioner of education that recommendation was annulled because the panel's chairperson had failed to disclose that he had represented the teacher in his capacity as general counsel for the New York State United Teachers and was in their employ as a permanent arbitrator for their internal disputes with employees. The court upheld the annullment and the reconvening of the panel with a new chairperson.[166]

3.6g General

Several cases centerd on disagreements between employers and employees over the meaning of words in agreements and statutes. An Ohio court found that reducing the hours of certain employees as an economy measure was not forbidden by a statute prohibiting salary reductions except where part of a uniform plan. The court defined the statutory term "salary" as (1) not excluding employees paid hourly wages, and (2) a rate of pay per hour rather than a total amount received from working any number of hours. The court reviewed the standards to be used in ascertaining the applicability of terms in statutes to unusual situations as follows (in descending order of persuasiveness):

(1) an explicit statutory definition of the word
(2) ascertaining that an adherence to the plain and ordinary meaning of the word would defeat the legislative purpose
(3) legislative intention . . . and *to the purpose to be accomplished*
(4) to give effect to the *words used* [in a statute], not to delete words *or to insert words not used*[167]

---

[165] Ripley v. School Comm. of Norwood, 451 N.E.2d 721 (Mass. 1983); School Comm. of Grafton v. Grafton Teachers' Ass'n, 452 N.E.2d 495 (Mass. 1983).

[166] Conley v. Ambach, 461 N.Y.S.wd 929 (N.Y. App. Div. 1983).

[167] Ohio Ass'n of Pub. School Employees, Chapter 672 v. Twin Valley Local School Dist. Bd. of Educ., 451 N.E.2d 1211, 1214 (Ohio 1983).

In Michigan, the meaning of the phrase "financial resources" in the agreement's provisions for declaring fiscal emergency and allowing certain layoff provisions to go into effect was found not, as the district claimed, to be limited to the budget surplus. The district had attempted to declare such an emergency and initiate layoffs when its surplus was more than consumed by a projected budget deficit. The court held that the phrase "means the funds—assets, expected revenues, etc. available for expenditure," and found that, under this definition, "[t]he record shows that there was no reduction in financial resources."[168] In Connecticut, a contractual phrase regarding boards' right to discipline employees "short of termination" was found to encompass a three-year suspension without pay for insubordination. The reviewing court found the action not excessive and clearly an action short of full termination.[169]

In three cases, terms of local agreements were pitted against state statutes. In Ohio, the statutory definition of the phrase "years of service" as meaning all service in any school district in the state was redefined in an agreement to provide that a maximum of five years of outside experience would be allowed for longevity purposes. The court found a companion law that permitted local boards to redefine allowable years of experience within limits and ruled that, by the latter, the board was given discretion to bargain for the changes under challenge.[170]

In Massachusetts, the association sought to compel the school committee to cease requiring more than twenty hours of employment per week to qualify for health insurance coverage, citing a statute that required employers to provide such insurance for all employees employed by the school committee for "no less than twenty hours per week." The committee argued that the statutory provision was directory, stating only a minimum from which it was free to expand. The court disagreed and would not, as the committee sought, bar under laches and voluntary waiver the possibility of recovery of damages for over seven years of violation. It left that determination to a trial court.[171]

In Oklahoma, a contract provided for five days of leave, two of which were to be without salary loss to the teacher and three of which were, pursuant to statute, to be reduced only by the amount that a substitute received. In this case the collective bargaining agreement explicitly gave the administration the prerogative to decide whether a substitute was required during any teacher absence, and the issue arose when the board did not hire a substitute but nevertheless reduced the teacher's pay an amount equivalent to the cost of one. The court found the district's action to be permitted by the agreement and the provisions of the statute, which were found to be a statement of limitation on reduction of a teacher's salary rather than a mandate either to hire a substitute or pay the teacher full salary for the days absent.[172]

---

[168] Port Huron Area School Dist. v. Port Huron Educ. Ass'n, 337 N.W.2d 413, 415 (Mich. Ct. App. 1983).

[169] Tucker v. Board of Educ., Town of Norfolk, 462 A.2d 385 (Conn. 1983).

[170] Maple Heights Teachers' Ass'n v. Maple Heights Bd. of Educ., 453 N.E.2d 619 (Ohio Ct. App. 1983).

[171] Lexington Educ. Ass'n v. Town of Lexington, 448 N.E.2d 1271 (Mass. App. Ct. 1983).

In Louisiana the education association attempted to force the school board to allocate 83.8 percent of the proceeds newly derived from sales tax revenues via a special election. The teachers claimed that by including in its campaign for passage of the allocation the statement that 83.8 percent of the district's budget was spent on salaries, the board thereby committed itself to using the money exactly in that amount. The court disagreed, finding that the board did not abuse its authority in allocating the new revenues differently.[173] In California, where a court found that employees who worked on four-day-per-week shifts were entitled to time and one-half benefits for holiday work, the court discussed how statutes and agreements should be accommodated: "legislative intent underlying a statute is to be ascertained by reading it in such a manner as will give effect to the ordinary impact of its language."[174]

A court-ordered desegregation plan in Chicago was alleged to violate the collective bargaining agreement and the union sued for breach of contract in the federal courts. The district court found that the desegregation order did not give the matter federal jurisdiction and that the Labor-Management Relations Act does not apply to school districts. In sum, the court found no federal remedy for alleged breach of a collective bargaining agreement in the public sector.[175]

3.7 JUDICIAL REVIEW OF AWARDS

Judicial review of administrative proceedings under collective bargaining legislation is inherently circumscribed. Not only do the doctrines of res judica and stare decisis result in stability of decisions and awards under review, but also the courts' perception that arbitration has been established as an *alternative to*, rather than a *preclude to*, court proceedings resists reversals. Michigan and New York courts described the matter thus:

---

[172] Earnest v. School Bd. of Indep. Dist. No. 16, 666 P.2d 1287 (Okla. 1983).

[173] Louisiana Ass'n of Educators v. St. Tammany Parish School Bd., 430 So. 2d 1144 (La. Ct. App. 1983).

[174] California, *supra* note 126, at 467.

[175] Chicago Teachers' Union v. Board of Educ., Chicago, 569 F. Supp. 597 (D. Ill. 1983).

> It . . . provides a simpler, less costly form of resolving disputes and avoids protracted litigation [Michigan].
>
> Judicial review of arbitration awards is . . . circumscribed lest the arbitrator's determination become the commencement instead of the end of litigation [New York].[176]

Consequently, all challenges either to lower court decisions or to arbitration awards face a strong presumption of validity; they need only be reasonable and based on substantial evidence.[177] According to a Wisconsin court, this standard "does not permit a court to overturn an agency's finding even if it may be against the great weight and clear preponderance of the evidence."[178] A Pennsylvania court referred to a "broad deference," defining it as meaning that "[s]o long as the subject matter of the dispute is encompassed within the agreement, the validity of the arbitrator's interpretation is not a proper subject for review; [this] applies equally to his determinations regarding the arbitrability of the subject matter of the grievance."[179]

When, as in Idaho, a court is asked to review the decisions of the school board directly (no arbitration having occurred), the standard is even greater, since the actions of elective bodies will be deferred to "unless corrupt, arbitrary, or unreasonable."[180]

3.7a Standard of Review

The standards that are used to review challenged awards are somewhat obscured because the highly vested interest that parties have in the outcome of their disputes leads losing sides to press forward for review simply because they feel strongly about the perceived injustice of the award. This, for the most part, risks their appearing to challenge the substantive content of the award, an approach that is rarely successful. Virtually all jurisdictions follow the practice reflected by a New York court's comment that "[a]s a matter of public policy, the merits of an arbitration are beyond judicial review."[181] Another court in the same state affirmed that "[t]he mere fact that a different construction could have been accorded the provisions concerned and a different conclusion reached does not mean that the arbitrators so misread the provisions as to empower a court to set aside the award."[182]

---

[176] Northern Michigan Educ. Ass'n v. Board of Educ., Cheboygan Area Schools, 337 N.W.2d 923, 926 (Mich. Ct. App. 1983); Dover, *supra* note 131, at 272.

[177] Lincoln, *supra* note 26; North Smithfield, *supra* note 139.

[178] Madison Teachers, Inc. v. Wisconsin Employment Rels. Comm'n, 340 N.W.2d 571, 573 (Wis. Ct. App. 1983).

[179] Bristol Twp. Educ. Ass'n v. Bristol Twp. School Dist., 460 A.2d 387, 388 (Pa. Commw. Ct. 1983).

[180] Gilbert, *supra* note 60, at 5.

[181] Dover, *supra* note 131, at 272.

To test whether the challenge improperly goes to the merits, courts uniformly use standardized positive and negative descriptors. Examples of the former are that decisions will be "given great weight" if they are based on "competent, material, and substantial" or "a preponderance of the competent" evidence.[183] In negative terms, qualities such as the following are sought: "not palpably erroneous," "not arbitrary, capricious, or illegal," "[not] an error of law [or] an abuse of discretion," "[does] not alter, add to, or detract from the provisions of the agreement," "[has no] undisclosed bias or conflict of interest," and "[not] completely irrational."[184] Taken together, these positive and negative qualities become the oft-used standard that states generally that if the award is drawn from the "essence of" or is "encompassed by" the agreement in "any substantial way," it will be upheld even where the possibility of error exists.[185]

A Pennsylvania court clearly articulated the breadth of the zone of acceptability when it noted that an award will be upheld whenever it "can in any rational way be derived from the Agreement, in light of its language, its context, and any other indications of the parties' intent."[186] Courts as far apart geographically as New York and Hawaii sounded a similar note: "[c]ourts may not overturn an award because they believe the arbitrator has misconstrued the apparent, or even the obvious meaning of the contract," and "[t]he arbitrator's decision will . . . be upheld unless there is fraud, corruption, procedural misbehavior or where the arbitrator exceeded his powers."[187]

Appellate court review of lower court cases is similarly circumscribed. A California court, in refusing to retry a school board's decision after a trial court had reversed it, said that "[t]he appellate court will only reverse the judgment of the superior [trial] court if it is based on an erroneous conclusion of law."[188] A Michigan appellate court articulated the standard in finding that lower court resolution of disputes "may not be set aside absent mistake, fraud, or unconscionable conduct."[189] When, however, the lower court's decision is found to be faulty at law or violative of public policy, it will be reversed or modified on appeal. In Montana a trial court's decision was reversed because it had entertained inadmissible *parol* evidence in finding that the teachers had waived their rights to certain retirement benefits.[190] In New York, where the appellate court could find no disputed issue of fact requiring a trail, it found the lower court in error for ordering one; but another court in that state found itself foreclosed from review when the record showed that sufficient evidence supported the trial court's award of back pay in a case that was based on the board's having denied appeals due a teacher who was involuntarily retired.[191] According to a Missouri court, trial court decisions are subject to a broadened standard of review if the initial decision was a noncontested adjudication rather than contested:

---

[182] Long Island Univ. Faculty Fed'n, Local 3998 N.Y.S.U.T., AFT, AFL-CIO v. Board of Trustees, Long Island Univ., 457 N.Y.S.2d 325, 327 (N.Y. App. Div. 1983).

[183] State v. New York State Pub. Employment Rels. Bd., 457 N.Y.S.2d 649, 651 (N.Y. App. Div. 1982); Michigan, *supra* note 32; Rankin v. Board of Educ., Marshalltown Commun. School Dist., 337 N.W.2d 886, 890 (Iowa Ct. App. 1983).

[184] Aio, *supra* note 11; Richland, *supra* note 40; Newman, *supra* note 47; Dover, *supra* note 131; Ripley, *supra* note 165; Grafton, *supra* note 165.

[185] Newman, *supra* note 47; South Bend, *supra* note 78; Lincoln, *supra* note 28; North Smithfield, *supra* note 139; Central Susquehanna Intermediate Unit Educ. Ass'n v. Central Susquehanna Intermediate Unit No. 16, 459 A.2d 889 (Pa. Commw. Ct. 1983).

[186] Pittston, *supra* note 137, at 1149.

[187] Long Island, *supra* note 182; University of Hawaii Professional Assembly v. University of Hawaii, 659 P.2d 717, 719 (Hawaii 1983).

> There is no supersedence by constitution or rule or statute [as in the case of judicial review of a contested case] to the operation of Rule 73.01 to the appellate review of a circuit court judgment in a noncontested case, and every logic commends it. Accordingly, *the court of appeals reviews the judgement of the circuit court* to determine whether the adjudication that the administrative decision was or was not "unconstitutional, unlawful, unreasonable, arbitrary or capricious, or involves an abuse of discretion," rests on substantial evidence and validly decides the questions of law. In that exercise the court of appeals—unlike the review of a contested case—may weigh the evidence before the circuit court when the record engenders a firm belief that the judgement is wrong.[192]

Somewhat broader standards of review are used when commission or PERB decisions are appealed. This derives from the capability of such tribunals, themselves, to substitute their judgment for that of the arbitrator and establish their own rules regarding conduct of hearings, including standards for reopening or not reopening their final orders.[193] This principle has definite limits, however, which become most clear, as explained in New Jersey: "where the issue is one of law, the Commissioner's and the State Board's decisions do not carry a presumption of validity and it is for this court to decide whether those decisions are in accord with the law."[194]

---

[188] 188. Alba v. Los Angeles Unified School Dist., 189 Cal. Rtpr. 897, 902 (Cal. Ct. App. 1983).

[189] 189. Northern Michigan, *supra* note 176, at 926.

[190] 190. Butte Teachers, *supra* note 54.

[191] 191. Abrams, *supra* note 55; Marland v. Ambach, 463 N.Y.S.2d 422 (N.Y. 1983).

[192] 192. Phipps, *supra* note 122, at 97.

[193] 193. Ripley, *supra* note 165; Gratton, *supra* note 165; School Comm. of New Bedford v. Labor Rels. Comm'n, 444 N.E.2d 963 (Mass. App. Ct. 1983).

3.7b Propriety of Awards

Breadth of presumption regarding the validity of awards notwithstanding, it is not unusual for them to be found outside the bounds of acceptability established by law. A court in Wisconsin, in finding an arbitrator's restoration of a dismissed teacher arbitrary and capricious, drew upon previous case law to define these two "tandem concepts":

> [arbitrary] . . . such action is unreasonable or does not have a rational basis . . . the result of an unconsidered, wilful and irrational choice of conduct and not the result of the "winnowing and sifting" process;
>
> [capricious] . . . the most flagrant violations of the scope of delegated discretionary powers . . . whimsical, unreasoning departure from established norms or standards . . . action which is mercurial, unstable, inconstant or fickle . . . so unreasonable as to "shock the sense of justice and indicate lack of fair and careful consideration."[195]

The arbitrator's action that the court found to fit the above description was his conclusion, based solely on the written record and no personal contact, that witnesses for the administration who had appeared at the board's hearing on the matter were not credible, consequently restoring a discharged teacher to her position.

Most faulty awards do not occasion such dramatic language, even though phrases such as "abuse of discretion," "exceeded his authority," and "contrary to law" differ from "arbitrary and capricious" more in form than in substance. In Illinois, an arbitrator was found to have no authority to hear the grievance of substitute teachers who were not members of the bargaining unit. Nonparties to the agreement, according to the court, cannot utilize its provisions.[196] An award of interest on back pay was reversed in Pennsylvania because it had not been requested in the original grievance.[197] Also in Pennsylvania, an award was reversed because the arbitrator exceeded his authority in ordering perfect scores posted for everybody as a remedy for improper administration of standardized tests. Retesting was found to be the only proper remedy.[198]

---

[194] Parsippany, *supra* note 148, at 18.

[195] Nicolet High School Dist. v. Nicolet Educ. Ass'n, 337 N.W.2d 846, 848 (Wis. Ct. App. 1983).

[196] Meridian, *supra* note 34.

[197] Pennsylvania State Educ. Ass'n v. Appalachia Intermediate Unit No. 8, 460 A.2d 1234 (Pa. Commw. Ct. 1983).

In Hawaii, arbitration awards were reversed where they were found to be contrary to the faculty handbook and state law. In the latter case, the arbitrator had ordered a special tenure review panel convened to hear claims of nonpromoted employees that they had been treated improperly.[199] An award of punitive damages was reversed in the state of Washington because the statutes were found not to authorize them,[200] and an award in New York that was ambiguous as to whether it was advisory or binding and that failed to dispose of some of the parties' petitions for relief was vacated and remanded.[201]

The range of awards that courts have found to be proper has already been established in previous sections. Examples that are more representative than exhaustive of what has been found to be acceptable include approval of an arbitrator's finding that a university had failed to follow its own procedures in denying promotion of faculty, reinstating and granting back pay to a discharged employee, determining whether certain employees were members of the bargaining unit, and permitting teachers to conduct association business within the workday.[202] Three cases not previously discussed upheld the following awards: one granted additional compensation for overtime work that became necessary when the board changed working hours; another classified, for pay purposes, replacement teachers who performed full-time service as regular rather than as substitute teachers; and the third used terms of the agreement to calculate disputed seniority placements.[203]

3.8 IMPASSE AND DISPUTE RESOLUTION

3.8a Factfinding and Arbitration

Resolution of impasse by means other than exercise of power, whether through the employees' organized efforts, the employers' economic and security sanctions, or an arbitrator's binding award, does not frequently appear in litigation. This is not to say, however, that prelitigation means are not widely used. In Wisconsin, for instance, fully eighty percent of the impasse conditions initially reported to the Employment Relations Commission are resolved by the parties prior to certification, and, of the twenty percent remaining, about half are settled through mediation.[204] Decisions mentioning or recommending advisory arbitration (*see* notes 106 and 107) represent the nearest approximation to nonadversarial disposition that was reported during 1983.

---

[198] Perkiomen Valley Educ. Ass'n v. Perkiomen Valley School Dist., 460 A.2d 896 (Pa. Commw. Ct. 1983).

[199] University of Hawaii v. University of Hawaii Professional Assembly, Watanabe, 659 P.2d 732 (Hawaii 1983); University of Hawaii v. University of Hawaii Professional Assembly, Wiederholt, 659 P.2d 729 (Hawaii 1983).

[200] Kennewick Educ. Ass'n v. Kennewick School Dist., 666 P.2d 928 (Wash. Ct. App. 1983).

[201] Farmingdale, *supra* note 106.

[202] University of Hawaii (Daeufer), *supra* note 29; Cape Elizabeth, *supra* note 30; Leapley, *supra* note 35; Graham, *supra* note 90.

[203] Danville Educ. Ass'n v. Danville Area School Dist., 467 A.2d 644 (Pa. Commw. Ct. 1983); Willamina School Dist. 30J v. Willamina Educ. Ass'n, 655 P.2d 189 (Or. Ct. App. 1982); Stein v. Philadelphia Fed'n of Teachers, Local 3, AFT, AFL-CIO, 464 A.2d 606 (Pa. Commw. Ct. 1983).

3.8b Rights on Expiration of Contracts

Questions regarding employees' rights upon expiration of their contracts when negotiations are continuing, however, do generate litigation. They almost always arise from a board taking one of three unilateral actions in order, ostensibly, to "encourage" the employees to settle: (1) terminating payments for certain fringe benefits, especially health insurance; (2) refusing to grant increments of the expired agreement's salary schedule; and (3) unilaterally implementing the terms of its last best offer. Employees' organizations object to all of these, the first two primarily because they have a direct impact on take-home pay, and the third because it erodes the fundamental principles of bargaining.

During 1983, examples of the latter two were reported. In Delaware, the United States District Court found that "if a right to step increases exists, it can be enforced in the Delaware courts."[205] In Pennsylvania, as well, the district's failure to "step up" teachers on the salary schedule after the agreement expired was found not justiciable, inasmuch as it was, if anything, an unfair labor practice, redress of which was required to be sought before a labor relations board.[206] In Indiana, by contrast, withholding step increases was found to be precluded by a statute that required maintenance of the "status quo" at impasse. The court defined the term as *all* aspects of the previous agreement, including the step increases on the old schedule, which was moved forward during the period of impasse.[207] A California district that attempted to implement its last best offer at impasse was found to be engaging in an unfair labor practice. The court reasoned the action was, though short of refusal to bargain in good faith, "destabilizing and disorienting," and, if permitted, would give the board a "one sided edge" that would surely delay, and even may totally frustrate, the process of arriving at a contract."[208]

---

[204] Milwaukee Sentinel, March 12, 1984, pt. 1, at 17.

[205] New Castle, *supra* note 23, at 1486.

[206] Bailey, *supra* note 115.

[207] Indiana Educ. Employment Rels. Bd. v. Mill Creek Classroom Teachers' Ass'n, 456 N.E.2d 709 (Ind. 1983).

3.9 CONCERTED ACTIVITY

3.9a Strikes

Strikes rarely occurred during 1983, but litigation carrying over from previous years' strikes was settled in a number of jurisdictions. Typically, courts are sympathetic to boards' petitions for injunctions against strikes where they are not permitted by law (there is no common-law right to strike in the public sector). In Pennsylvania, a court's issuance of a back-to-work order was found justified because the loss of instructional time to students constituted a "clear and present danger to the public welfare." The district's attempt to escape compliance with an accompanying order to continue bargaining was thwarted by the court's refusal to transfer that part of the dispute to the labor relations board as an unfair labor practice.[209]

In Ohio, striking teachers found they were not entitled to separate trials for violating a no-strike court order, and their claim that listing remedies for work stoppages in the PERA precluded the issuance of injunctions was rejected. However, the court ruled that their defiance of a court order amounted to criminal contempt necessitating proof of guilt "beyond reasonable doubt" prior to punishment rather than the lesser "clear and convincing" standard that the trial court had used. The appellate court reviewed the purpose of penalties for such contempt as follows: "the fine cannot coerce compliance, nor is it remedial, but rather is a punishment for completed acts of disobedience. Its purpose is to vindicate the authority of the court and the law."[210]

Damages arising from strikes were sought in two cases. In California, the PERB, not the courts, was found to have jurisdiction to hear a district's claims against striking unions for engaging in an illegal strike.[211] In New York, a union local kept off the job by a wildcat strike of other unions attempted to recover its members' lost wages from the offending union. The court could find no evidence that the plaintiff attempted to perform its work during the strike; consequently the board's witholding of the contract payments was upheld.[212] Teachers in two districts in Pennsylvania tried to obtain unemployment compensation for a period during which they engaged in a work stoppage. Finding no evidence that their absence from the job was a lockout, as they claimed, the court disallowed their petition as well as finding that the district's failure to "step up" the salary schedule was *not* a disturbance of the status quo.[213]

---

[208] Moreno Valley, *supra* note 66, at 66.

[209] California Area School Dist. v. Pennsylvania State Employees' Ass'n, No. 8006 (Pa. Ct. C.P. 1983); Decker, *supra* note 17, at 39,551.

[210] Board of Educ., Hamilton City School Dist. v. Hamilton Classroom Teachers' Ass'n, 449 N.E.2d 26, 31 (Ohio Ct. App. 1982).

[211] El Rancho Unified School Dist. v. National Educ. Ass'n, 192 Cal. Rptr. 123 (Cal. 1983).

3.9b Enforcement Actions

Overt district response to work stoppage during 1983 was typically limited to withholding pay for days lost. In Michigan the action was successful even where the reduction came indirectly, due to the board's changing the length of the school year to accommodate the lost days after the strike was settled.[214] In Illinois and Pennsylvania, allegations that boards had unlawfully reduced salaries from contractual amounts were held to be charges of unfair labor practice, therefore requiring arbitration and PERB review prior to litigation.[215]

Allegations of refusing to hire as reprisal for a teachers' strike were made in Oregon and Illinois. In the former state, attorney's fees were not awarded even though the charge of retaliatory hiring of noncertified employees was successful. In the latter, substitute teachers, though not union members, had refused to cross picket lines during a teacher strike. When they found themselves not called for service subsequently they sought the assistance of the union. As nonparties to the agreement, they were found not to be protected by its terms, including grievance filing and arbitration.[216]

Two issues were settled regarding statutory delimiters for strike-imposed changes in compensation. For bus drivers laid off due to a teacher strike, their one-week waiting period for unemployment compensation began the day they were laid off, not the immediately following Sunday as the Commissioner of Economic Security had interpreted the statutory meaning of a "one week" delay.[217] For teachers who were penalized salaries for a work stoppage, calculation of a ninety-day limit for deduction of penalties began on the date of the issuance of the check, not its arrival. Hence, though they received their reduced checks after the ninety-day limit, the deductions were still valid.[218]

---

[212] Parochial Bus Systems, Inc. v. Board of Educ., City of New York, 457 N.Y.S.2d 285 (N.Y. App. Div. 1983).

[213] Fairview School Dist. v. Commonwealth Unemployment Compensation Bd., 454 A.2d 517 (Pa. 1982) (also disposed of a number of additional cases arising from the same dispute); Union City School Dist. v. Commonwealth Unemployment Compensation Bd., 454 A.2d 517, 522 (Pa. 1982).

[214] Ash, *supra* note 23.

[215] East Pennsboro, *supra* note 105; Arbor Park, *supra* note 111; Bailey, *supra* note 115.

[216] Oregon Educ. Ass'n v. Eugene School Dist. No. 4J, 666 P.2d 272 (Or. Ct. App. 1983); Meridian, *supra* note 34.

[217] Mortel v. Independent School Dist. No. 831, Forest Lake Pub. Schools, 334 N.W.2d 408 (Minn. 1983).

It would be as risky as it is tempting to overgeneralize the courts' lack of sympathy for teachers' various job actions during impasse. A California court suggested that the common-law prohibition against public sector strikes, absent expressed statutory provision for them, is at least subject to reexamination under labor relations legislation. In a long-standing, and not yet consummated, dispute over the proper remedy for an unauthorized strike, the court observed that an otherwise illegal strike might be justified under the law, given a sufficiently egregious employer labor practice:

> While conceding that EERA does not provide express protection for economic strikes, the Unions reason that strikes undertaken in response to unfair practices on the part of a public school employer—i.e., unfair labor practice strikes—may be ruled protected. That idea may seem anomalous. In fact, it is not. The proposition finds substantial support in ths court's decision in *San Diego Teachers* which recognized that "EERA gives PERB discretion to withhold as well as to pursue" a remedy and that the overriding consideration is whether imposition of a remedy will effectuate the purposes of the act. (593 P.2d 838). The proposition also finds support in a decision of the Michigan Supreme Court interpreting that state's Public Employment Relations Act. Although Michigan's PERA expressedly declares public employee strikes to be illegal the Michigan Supreme Court held, in *Lamphere School v. Lamphere Fed'n of Teachers*, (Mich. 1977) 252 N.W.2d 818, 824 that a public employer's conduct may convert an unlawful economic strike into a protected unfair labor practice strike . . . against which no remedy should be imposed.[219]

A concurring opinion, while supporting the decision's central theme that the PERB's jurisdiction preempted a trial court from adjucating a claim in torts for damages arising from a strike, argued that "public employee strikes are illegal in this state. . . . This court should no longer continue its hesitant, tentative ritual dance around the perimeter of this central legal principle, but honestly, openly, and forthrightly enforce it."[220]

---

[218] Swital v. Board of Educ., Bay Shore Union Free School Dist., 461 N.Y.S.2d 62 (N.Y. App. Div. 1983).

[219] El Rancho, *supra* note 211, at 130.

[220] *Id.* at 133.

3.10 MISCELLANEOUS DECISIONS

Anything as complex as employer-employee interaction confined within the four walls of a written agreement (and related laws) is inevitably bound to test the limits of its confinement by generating unanticipated incidents that must be resolved. Some of the more puzzling moments occured when the question arises as to what controls the disposition of a dispute when either or both of the following exists: (1) the agreement expires, or (2) the affected member has left employment and is no longer party to the agreement. A New York court resolved it as follows:

> As a matter of law, disputes covered by a collective bargaining agreement are to be resolved pursuant to the provisions of such agreement even if its term has expired or the union member has left his employment; such rights as he may have are derived from the very agreement that entrusts their enforcement to the union.[221]

Suppose, for another puzzle, a national union suspends a local for being in arrears in its dues to the parent body. Two years later, the local formally disaffiliates. Was, as the union constitution seemed to indicate, the local liable for the dues not paid during the time of the suspension up until the time of its disaffiliation? Or, as the local argued, did their suspended status mean that they received no services and, hence, owed no dues? A New York court, though conceding that the constitution and bylaws were ambiguous, found that the dues were owed, inasmuch as the charter indicated that suspension was a penalty short of disaffiliation for failure to pay dues, and all benefits remained intact save participation in the annual convention. Further proceedings to fix the amount of back dues owed were ordered.[222]

Questions arose when *parents* picketed the schools in protest against board action in closing a building, and the board closed the schools for fear of violence. Do the teachers get paid for the days under a statute providing that when a school is closed "by proper authorities" due to "calamitous cause" teachers should suffer no loss? Or, as the district claimed, was there insufficient evidence that the picketing protended "calamity," and was the local principal who ordered the closures a "proper authority" merely by virtue of having received the permission of the county superintendent of schools to do so? The court answered both in the affirmative, finding, especially, that concern for the safety of the children and the teachers was an administrative judgment that should not be reviewed by a court. The employees' pay was restored.[223]

---

[221] Abrams, *supra* note 55, at 800.

[222] Shanker v. Isenberg, 464 N.Y.S.2d 863 (N.Y. App. Div. 1983).

[223] Dillon v. Mingo City Bd. of Educ., No. 15548 (W. Va. 1983); Decker, *supra* note 17, at 39,323.

Does a law providing that certificated employees absent due to illness for a period of five months or less shall receive pay equal to the difference between their salaries and that of the substitutes hired to replace them contemplate the entitlement only once or does it create a separate entitlement for each school year? The problem arose when a teacher in California, who was out for nearly two years due to work-related injury, claimed the salary and other benefits for the entire period and the district refused to pay after the end of the first year. The court found that the statute created new entitlements every year and awarded the pay and other benefits restored.[224]

In Oregon, an interesting "what if?" occurred when a typographical error caused a negotiated agreement of a one percent salary increase for hourly employees to be printed as ten percent. The district sought formal reformation of the agreement, but the association refused. The district then sought judicial review, which was denied as being out of the court's jurisdiction. Although the district was successful in maintaining the salary at the one percent level, the appellate court's decision took note that a school district "cannot invoke circuit court jurisdiction merely by characterizing its action as reformation of a contract .... Collective bargaining agreements are not 'ordinary contracts' and are not 'governed by the same old common law concepts which control such private contracts' but are 'unique in character and a field unto themselves.' "[225]

In a lengthy decision a California court systematically reviewed and disposed of over seventeen causes for action rising out of newspaper reports of a defeated incumbent board member's actions during a teachers' strike and two election campaigns. One of the plaintiff's claims was that innuendoes were made charging her with being on the teachers' side and with appearing at teachers' union rallies and that these were defamatory. The court agreed that the making of such statements did present triable issues of fact and ordered the trial court to reverse its previous summary dismissal of this portion of the claims. The appellate court refused, however, to give much consideration to the plaintiff's claim for damages due to failure to win the election. It found and cited several precedent decisions which had uniformly and unsympathetically refused to permit losing candidates to recover, in defamation action, the damages represented by lost future earnings and benefits of office. The various rationale included the following:

---

[224] California Teachers' Ass'n v. Governing Bd. of Gustine, 163 Cal. Rptr. 650 (Cal. Ct. App. 1983).

[225] School Dist. 115, *supra* note 113, at 823.

> Lost future financial perquisites of office [are] . . . too uncertain and speculative because a thousand factors might influence an election . . . . Looking into the cause of election defeats [would be] akin to opening Pandora's box . . . . It is common knowledge that there are many surprises as the result of elections by the people . . . . The evidence here does not show any possibility [plaintiff] can establish she would have won reelection except for those statements we deemed potentially libelous.[226]

Finally, a district in Iowa had agreed in its collective bargaining agreement to consider multiple factors—teaching experience, relative skill and ability, teaching experience in other schools, breadth and depth of certification, and subject and grade level expertise—prior to selecting any teacher for layoff was required by a court to abide by the agreement. It had laid off a teacher solely on the basis of his experience in the district, leading the court to decide that, although it could foresee situations in which the board need not consider all the factors, in this case it should have inquired, at least, into his relative skill and ability. The teacher was reinstated.[227]

3.11 CONCLUSION

During 1983 the courts sent a clear and consistent message about litigating collective bargaining disputes: Do not bring them to the bar; administrative proceedings have been established to resolve them and there is little inclination to change the decisions reached thereby. Even the exceptions, where courts reverse the decisions of arbitrators and PERBs, seem to deliver the same message by invariably containing extended, sometimes almost apologetic, rationales justifying the rare departure from the general thrust of the law. Of course this is not news to anyone except, perhaps, erstwhile litigants who perceive the courts as having been invented primarily to redress their particular private complaints, much like a knight in shining armor always waiting to happen along just in time to rescue a damsel in distress.

The 1983 decisions reveal no such trend. They reveal that the courts are committed neither to protect nor to beleaguer either employer or employee rights or benefits. Instead, they reveal a commitment to examining the law, whether it be found in constitutions, statutes, or terms of agreements, and enforcing it even to the discomfort of litigants. Essentially the court are stating, sometimes explicitly, that if the requirements are troubling, they should be changed; meanwhile they should be followed. This is the best lesson to be gleaned from the 1983 decisions. Read and follow the law and the terms of local agreements. The courts made neither of them, have little disposition to do so, and will not accept any of the blame for the awkward outcomes of either. Thereby, it is difficult to recruit the courts as rescue squads to redeem either employers or employees from bargains struck in moments of indiscretion.

---

[226] Fisher v. Larsen, 188 Cal. Rptr. 216, 223 (Cal. Ct. App. 1982).

[227] Sac City Bd. of Educ. v. Schermerhorn, 340 N.W.2d 789 (Iowa Ct. App. 1983).

4

PUPILS

Henry S. Lufler, Jr.*

Introduction 4.0
Handicapped and Exceptional Children 4.1
  Tuition and Assignment 4.1a
  Right to Education and Services 4.1b
  Discipline 4.1c
  Attorney Fees and Damages 4.1d
Public School Assignment, Tuition, and Transportation 4.2
  Tuition and Assignment 4.2a
  Transportation 4.2b
  Compulsory Attendance 4.2c
Bilingual-Bicultural Programs 4.3
Private and Parochial Schools 4.4
School Sports 4.5
  State Athletic and Activity Associations 4.5a
  Sex Discrimination 4.5b
Substantive Rights of Students 4.6
  Search and Seizure 4.6a
  First Amendment Religious Rights 4.6b
  First Amendment Freedom of Expression 4.6c
Sanctions for Student Misconduct 4.7
Testing and Placement 4.8
Desegregation 4.9
  Systemwide Remedies 4.9a
  Cross-District Remedies 4.9b
  Developments Under *Swann* and *Keyes* 4.9c
  Fifth Circuit Cases 4.9d
  State Courts 4.9e

*The author wishes to thank Randall J. Boe for his assistance in gathering materials for this chapter.

4.0 INTRODUCTION

Cases concerning the treatment of pupils continued to be decided in large numbers in 1983. For the first time in five years, however, the number did not increase over the previous year. Among the almost two hundred new cases reported in this chapter are important decisions in the areas of student expression and the payment of fees and damages in handicapped student placement and treatment litigation. The legal uncertainty regarding the availability of attorney fees and damages in such cases had led to an avalanche of lawsuits, with some resolution of the issue in sight.

Desegregation cases are declining in number, and some of the cases reported in this chapter tell of consent decrees or court rulings that school systems have achieved unitary status. While settlements have been reached in some cases, litigation started in the 1950s in the southern states under the jurisdiction of the Fifth Circuit Court of Appeals remains largely unresolved. In addition, a number of 1983 cases allege that school systems in the South that once were declared free of segregation have slipped back to dual system status. The segregation of minority students within certain programs in an otherwise desegregated system also led to a lawsuit in 1983. Such "second generation" discrimination cases are likely to be more common where systemwide desegregation is achieved.

4.1 HANDICAPPED AND EXCEPTIONAL CHILDREN

The avalanche of cases involving handicapped children continued unabated in 1983. Many of the cases reported in this section in recent years reached federal courts of appeals last year and many new cases were initiated. A new 1983 heading started in this section, attorney fees and damages, has expanded significantly as courts continue to wrestle with claims filed by successful litigants. While courts generally acknowledge that the Education for All Handicapped Children Act of 1975 (EHCA) does not provide for fees and damages, some have found that recovery is possible under sections 504 and 505 of the Rehabilitation Act of 1973 and under the Civil Rights Attorney's Fees Award Act.[1]

In 1982 the United States Supreme Court addressed the requirements of EHCA for the first time, deciding what was meant by the Act's call for "free appropriate public education" and what was to be the role of the courts in reviewing a handicapped child's placement or program.[2] The majority in *Rowley* concluded that handicapped children must receive "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."[3] In requiring programs of "educational benefit" the Court rejected claims that students receive equal educational opportunity, a more costly option. Courts still must struggle with the "educational benefit" standard, as well as deciding what "related services" are required under EHCA. Both terms were the subject of considerable litigation in 1983.

---

[1] 42. U.S.C.A. §§ 1983, 1988 (1976).

Rowley requires school districts to provide handicapped children with an "individualized educational plan" (IEP) that is "reasonably calculated" to enable the child to achieve passing grades and advance from grade to grade.[4] Much of the early litigation following the passage of EHCA asked courts to decide on the merits of two IEPs, one developed by the school system and one by the parents. The *Rowley* majority instructed courts to avoid making such choices. Instead, courts should ensure that systems had followed the EHCA procedures in developing the IEP, including parental involvement and subsequent appeals to state educational agencies in cases of disagreement. The IEP must be calculated to provide the child with educational benefit. Assuming such factors are present and the procedures were followed, courts were instructed to avoid requiring alternative programs.

4.1a Tuition and Assignment

Lower courts applied the holdings in *Rowley* to settle a number of cases in 1983. Parents of a learning-disabled Maryland high school student filed suit when local school officials refused to fund the student's placement at a nonpublic school.[5] A hearing officer had concluded that a public school learning center was an adequate placement and this decision was sustained by the state board of education. The Fourth Circuit Court of Appeals, citing *Rowley*, concluded that "it does not follow that the less appropriate program is not 'appropriate' within the meaning of the Act."[6] Because the child would benefit from the public school program, the court dismissed the parents' suit.

---

[2] Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176 (1982).

[3] *Id.* at 201.

[4] *Id.* at 203-04.

[5] Hessler v. State Bd. of Educ. of Maryland, 700 F.2d 134 (4th Cir. 1983).

[6] *Id.* at 139.

Parents of an autistic Ohio student appealed a state-approved placement decision for their son, arguing that an alternative twelve-months placement lasting well beyond the student's twenty-first birthday would be more beneficial. The plaintiff's case was dismissed by a federal district court,[7] which examined the placement in great detail, and the parents appealed. In upholding the lower court, the Sixth Circuit Court of Appeals saw the plaintiff's arguments only as reflecting a difference of opinion as to the most effective teaching methods available to advance the student's education.[8] Because all EHCA procedures had been followed and the IEP had been found appropriate, the appeals court sustained the placement. The court did reverse a portion of the lower court's decision, holding that parents were not "support personnel" under the terms of EHCA and that the school district did not therefore have an obligation to provide them with special training to handle their child.

Parents of an eighteen-year-old emotionally disturbed child in Tennessee sought a placement at a private out-of-state facility, in the face of a local board decision to place the child in a state program.[9] The district court upheld the board's placement, noting that the student's lack of cooperation in the program selected could not serve as justification for ordering the alternative program. In a case with a reverse set of circumstances, Michigan parents argued that local mainstreaming was preferable for their daughter who suffered from cerebral palsy, while school officials concluded that a program in a school for those who are handicapped would be of greatest benefit.[10] Citing *Rowley*, the district court granted summary judgment for the school system, concluding that EHCA procedures had been followed fully.

The language of the *Rowley* decision makes it clear that not every student placement is adequate, but that programs must be reasonably calculated to enable students to receive educational benefits. In two separate cases, the First Circuit Court of Appeals concluded that school districts had not offered such programs. In the first, the appeals court upheld a district court decision ordering residential placements for learning disabled children instead of the self-contained special education classrooms favored by the district.[11] The Rhode Island State Commissioner of Education had overruled the district and concluded that the district's IEP for the students would not permit them to receive educational benefits. In the second fo the First Circuit cases, the appeals court concluded that a severely retarded child would not make any educational progress at all unless placed in a residential facility.[12] Claims that the child's needs were not "educational in nature" were rejected, as was the argument that the district court had exceeded its review powers as delineated in *Rowley*. In a similar case, the Nebraska Supreme Court modified an opinion following the publishing of the *Rowley* decision, but refused to rehear a case and continued to order residential treatment for a mentally retarded, autistic child because the alternative proposal offered the child no educational benefit.[13]

---

[7] Rettig v. Kent City School Dist., 539 F. Supp. 768 (N.D. Ohio 1981); *see* THE YEARBOOK OF SCHOOL LAW 1983 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1983] at 158.

[8] Rettig v. Kent City School Dist., 720 F.2d 463 (6th Cir. 1983).

[9] Clevenger v. Oak Ridge School Bd., 573 F. Supp. 349 (E.D. Tenn. 1983).

[10] Johnston v. Ann Arbor Pub. Schools, 569 F. Supp. 1502 (E.D. Mich. 1983).

[11] Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983); *see* YEARBOOK 1983 at 154.

EHCA required that there be no change in the placement of the handicapped student during the administrative appeals process.[14] This "stay-put" requirement was affirmed by a 1980 Fourth Circuit Court of Appeals decision, which the United States Supreme Court declined to review.[15] Cases still challenge this requirement, often arguing that the timetable for the hearings—forty-five days for the formal hearing at the district level and state review within thirty days—has not been met. As a general rule, courts allow some flexibility in this schedule.

Six cases arguing the "stay-put" provision were decided by circuit courts of appeal in 1983. A California student exhibiting behavioral problems was expelled from the school he was attending and was unilaterally placed in another private school by his parents. The school district then recommended placement in a public school program while the parents continued the private school placement. While arguments were advanced over whether the district had approved the private school treatment, the appeals court refused to decide the issue, concluding that no claim for tuition could be made because the administrative appeal process had not been exhausted.[16] Unilateral transfers are possible, the court concluded, only when there was bad faith on the part of the school district in the placement process or the health of the student was threatened. Neither circumstance was present in this case.

A long-standing New York case was heard by the Second Circuit Court of Appeals.[17] The student, suffering from minimal brain dysfunction, was enrolled in a private school and was transferred by his mother to another private school, at which time she requested a student evaluation. The district agreed to pay the tuition at the second school only for the rest of the school year while the evaluation was conducted. The evaluation concluded that a public school placement was appropriate, but the parent continued the private schooling while appealing the decision. The appeals court concluded that the district's willingness to let the child finish the school year at the second school did not obligate it to further funding because it was the parent's initial unilateral decision to change the placement that started the dispute.

---

[12] Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983).

[13] Adams Cent. School Dist. No. 090 v. Deist, 338 N.W.2d 591 (Neb. 1983).

[14] 20 U.S.C. § 1415(e)(3) (1976).

[15] Stemple v. Board of Educ., Prince George's Cty., 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981).

[16] Mountain View-Los Altos Union High School v. Sharron B.H., 709 F.2d 28 (9th Cir. 1983).

[17] Zvi D. v. Ambach, 694 F.2d 904 (2d mCir. 1982); *see* THE YEARBOOK OF SCHOOL LAW 1982 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1982] at 219-20.

Parents of a Virginia learning disabled student obtained an evaluation of their child to which they subsequently objected. They placed their son in a private school and sought payment from the school district. Though questions about the timing and adequacy of the district's alternative were raised, the Fourth Circuit Court of Appeals affirmed the "stay-put" requirement and denied the tuition request.[18] In a similar case, the Fifth Circuit Court of Appeals rejected a variety of claims for reimbursement filed by Texas parents who had disregarded their school district's IEP and had unilaterally placed their child in a private school.[19]

Another Texas case involving a placement move was heard by the Fifth Circuit Court of Appeals. A district court had issued a preliminary injunction ordering the Pasadena School District to pay the tuition charges for a severely handicapped child while the district was seeking a placement that would put the child into the public schools.[20] The district court concluded that the district had engaged in an administrative delay and that the child's handicaps were such that harm would result to the child as the result of public school placement. While the district court subsequently made its injunction permanent, the appeals court cited EHCA and rejected the district court's order on the tuition payment for the period before the issuance of the lower court's final order.[21] The case was remanded to the district court for further hearing on whether equitable relief should be granted.

In a Kentucky case, the "stay-put" provision was used by parents who challenged the closing of a state-operated day treatment facility.[22] The facility was closed for budgetary reasons. The district was not successful in convincing the Sixth Circuit Court of Appeals that the closing was not a change in placement, especially since children were being transferred from a twelve-months to a nine-months program. Claims that the facility was not an "educational placement" also fell on deaf ears. On the narrow question of budgetary limitations, however, the appeals court concluded that the "stay-put" provision did not apply when an entire facility was closed and the court refused to order its reopening.

---

[18] Rowe v. Henry Cty. School Bd., 718 F.2d 115 (4th Cir. 1983).

[19] Marrion H. v. Austin Indep. School Dist., 714 F.2d 1348 (5th Cir. 1983).

[20] Stacey G. v. Pasadena Indep. School Dist., 547 F. Supp. 61 (S.D. Tex. 1982); *see* YEARBOOK 1983 at 152-53.

[21] Stacey G. v. Pasadena Indep. School Dist., 695 F.2d 949 (5th Cir. 1983).

[22] Tilton v. Jefferson Cty. Bd. of Educ., 705 F.2d 800 (6th Cir. 1983).

A deadlock in the development of an IEP for an Oklahoma emotionally disturbed student was broken when his parents unilaterally enrolled him in a private school. The school district had agreed to hire a teacher to instruct the child, but the parents disputed the person selected for the job on the grounds of lack of experience. A federal district court refused to order the district to fund the private placement.[23] In a New York case, parents similarly did not exhaust administrative appeals procedures before a unilateral private school placement.[24] Though the public school district had delayed for four months in finding a suitable placement, a district court concluded that state administrative proceedings should have been initiated to address the situation.

In one case in which the district had to pay tuition, the learning-disabled District of Columbia student was already enrolled in the private school. The defending school system had agreed to pay the student's tuition at the school, while seeking an alternative placement. There was no time limit attached to the agreement and thus the district court found that the district was obligated to continue the payment for the "current placement," even as the hearing process surrounding the student's IEP entered its second year.[25]

New York parents were unsuccessful in convincing a state appeals court that the transfer of their handicapped child from one private school to another should be approved because the schools were so similar that the new school should be considered the student's "current placement."[26] The court also concluded that the New York State Commissioner of Education could not approve tuition payments at a private school without conducting a due process hearing.

A variety of issues, including attempts by parents to claim a private school as their child's "current placement," were considered by a Massachusetts district court.[27] The case consolidated three cases, one being heard for the first time and two on remand from the First Circuit Court of Appeals.[28] All hinged on the interpretation of Massachusetts law and only one of the three cases was decided. The court concluded that parents should be reimbursed for tuition costs under state law because the student had been moved into the placement ultimately determined to be correct.[29] The other two cases were continued for further hearings.

---

[23] Cain v. Yukon Pub. Schools, 556 F. Supp. 605 (W.D. Okla. 1983).

[24] Smrcka v. Ambach, 555 F. Supp. 1227 (E.D.N.Y. 1983).

[25] Jacobsen v. District of Columbia Bd. of Educ., 564 F. Supp. 166 (D.D.C. 1983).

[26] Lillian S. v. Ambach, 461 N.Y.S.2d 501 (N.Y. App. Div. 1983).

[27] Doe v. Anrig, 561 F. Supp. 121 (D. Mass. 1983).

[28] Angier v. Anrig, *heard with* Town of Burlington v. Department of Educ., 665 F.2d 428 (1st Cir. 1981); Doe v. Anrig, 692 F.2d 800 (1st Cir. 1982); *see* YEARBOOK 1982 at 125 and YEARBOOK 1983 at 151.

In a Connecticut tuition case, foster parents were named to enable a student to continue to receive residential tuition payments from a school district. Meanwhile, the child's parents moved to Vermont. This interesting case was continued after errors in the service of legal notices and the wording of the complaint were addressed.[30]

Faulty hearings involving due process claims after parents challenged an IEP led to claims by parents that school districts were responsible for tuition charges that accumulated as a result. The local school district refused to consider the student to be learning disabled even after the New York State Commissioner of Education ruled to that effect.[31] The school district maintained that state procedural due process should be expanded to allow school boards to contest further the commissioner's decisions. A federal district court held that the request was unnecessarily delaying the services needed and ordered the student to receive treatment within ten days. Similarly, a California district court accused a school district of engaging in delaying tactics by requesting additional tests of the student when the evaluations on file were "voluminous."[32] The court ordered the student admitted to a residential treatment center.

In a Pennsylvania case involving EHCA hearing delays, a state court refused to allow a school district to pay the tuition charge it desired to pay for a placement when the decision was subsequently overturned by the state secretary of education.[33] Even the secretary argued the tuition should be paid, since the state department had a custom of making such payments for thirty days after the secretary had overruled an examiner's decision. The court found that the custom was not recognized by law and that the parents must pay.

In a case since appealed to the United States Supreme Court, a divided panel of the Sixth Circuit Court of Appeals held that a district court failed to apply correct standards of review in approving the Cincinnati School District's decision not to mainstream a severely retarded boy.[34] The student's placement was challenged by his parents who argued that the district's policy of assigning all trainable, mentally retarded students to county schools for the retarded violated provisions of EHCA. Distinguishing the case at hand from *Rowley*, the appeals court majority noted that the district policy violated the EHCA requirement of mainstreaming, which was not at issue in the Supreme Court case. In remanding the Cincinnati case, the appeals court asked the district court to conduct a de novo review, as required by *Rowley*, rather than the abuse-of-discretion standard it employed in affirming the district's policy. This is a case that will be further reported next year.

---

[29] Doe v. Anrig, *supra* note 27.

[30] Board of Educ. of Fairfield v. Connecticut State Dep't of Educ., 466 A.2d 343 (Conn. Super. Ct. 1983).

[31] Blazejewski v. Board of Educ. of Allegany Cent. School Dist., 560 F. Supp. 701 (W.D.N.Y. 1983).

[32] Christopher T. v. San Francisco Unified School Dist., 553 F. Supp. 1107 (N.D. Cal. 1982).

[33] Wordsworth Academy v. Gaugler, 453 A.2d 1064 (Pa. Commw. Ct. 1982).

[34] Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983).

Other procedural issues concerning EHCA hearings were raised in 1983 cases. A Rhode Island district court held that parental consent was not required for a reevaluation of a student whose IEP was prepared three years earlier.[35] Such consent is necessary for an initial IEP. No rights were lost, the court reasoned, because the parents could administratively challenge any new IEP prepared as the result of the reevaluation. Likewise, a Missouri district court refused to interfere with the decision made by a three-person evaluation panel when the state-selected member was replaced in the middle of the hearing process.[36] The court reasoned that the parents' rights were not affected since it was the state's one representative on the three-person panel who was replaced.

A variety of state courts also considered issues surrounding placement hearings. A New Jersey court remanded a case to the state agency after determining that both the record and the arguments were inadequate and incomplete.[37] A Connecticut court concluded that a local board could not appeal a placement decision without including the student and parents as parties of record.[38] The Supreme Court of New Hampshire held that it could not accept cases directly from decisions made by the New Hampshire Board of Education.[39] It is necessary to initiate such proceedings in civil court. Similarly, appeal from a hearing officer's decision in Texas cannot be taken to court until the officer has acted on motions for a rehearing.[40] Finally, a New York case was dismissed as moot when the student had already repeated the grade in question.[41]

---

[35] Carroll v. Capalbo, 563 F. Supp. 1053 (D.R.I. 1983).

[36] Cothern v. Mallory, 565 F. Supp. (W.D. Mo. 1983).

[37] Drake v. Department of Human Servs., 453 A.2d 254 (N.J. Super. Ct. App. Div. 1982).

[38] Board of Educ. of the City of New Britain v. Connecticut State Bd. of Educ., 461 A.2d 997 (Conn. Super. Ct. 1983).

[39] *In re* Milan School Dist., 459 A.2d 270 (N.H. 1983).

[40] Manor Indep. School Dist. v. Leachelle, 647 S.W.2d 770 (Tex. Civ. App. 1983).

[41] Board of Educ. of Rocky Point v. Ambach, 457 N.Y.S.2d 946 (N.Y. App. Div. 1983).

Costly placements sometimes lead to lawsuits when school districts claim they lack the funds to pay for them. As a general rule, courts do not consider the ability to pay when ordering placements after EHCA procedures are followed. In New York, the commissioner of education sets maximum tuition rates that are charged by private schools receiving reimbursement from the state. Reductions in these rates led to a challenge filed by the parents of autistic children. In refusing to issue a preliminary injunction to stop the new tuition structure, the Second Circuit Court of Appeals noted that no schools had yet been closed and that the plaintiffs had failed in their responsibility to state a claim upon which relief could be granted.[42]

A Massachusetts school district claimed it could not pay the tuition of a special needs student because a statewide budgetary limit on school spending affected its ability to pay. A lower court found the argument irrelevant under Massachusetts law and this finding was sustained.[43] A claim that federal reimbursement funds had "dried up" was rejected by a New Jersey court as sufficient reason for failing to pay the tuition costs of a mentally retarded student as required by state statute.[44]

The dispute over the disposition of the profoundly retarded residents of the Pennhurst State School in Pennsylvania continued in 1983. The lengthy litigation again reached the Third Circuit Court of Appeals following a district court order that a child would receive more beneficial services in a community living arrangement.[45] The appeals court reversed.[46] While noting that only two school-age children remained at Pennhurst, the court concluded that parents had not been afforded sufficient consideration in the proceedings and remanded the case.

Kansas parents who sought to have their child mainstreamed failed to convince the Kansas Supreme Court that it should order such a placement.[47] The school district argued that the visually impaired child belonged in the Kansas State School for the Visually Handicapped. The Kansas high court decided not to allow "additional evidence" to be submitted at the appellate level and that there was "substantial evidence" as required under Kansas law for the initial decision made by the local court. A Pennsylvania court reached the opposite conclusion, using that state's "substantial evidence" statute. The court ordered a Pennsylvania brain-damaged student sent to an institution outside the state, accepting the parents' arguments that there was no evidence that the state's alternative would be effective.[48]

---

[42] Fallis v. Ambach, 710 F.2d 49 (2d Cir. 1983).

[43] School Comm. of Brookline v. Bureau of Sp. Educ. Appeals, 452 N.E.2d 476 (Mass. 1983).

[44] D.S. v. Board of Educ. of the Twp. of East Brunswick, 458 A.2d 129 (N.J. Super. Ct. App. Div. 1983).

[45] Halderman v. Pennhurst State School, 553 F. Supp. 660 (E.D. Pa. 1982); *see* YEARBOOK 1983 at 153.

[46] Halderman v. Pennhurst State School, 707 F.2d 702 (3rd Cir. 1983, *rehrg. en banc denied*, 1983).

[47] Bailey v. Unified School Dist. No. 345, 664 P.2d 1379 (Kan. 1983).

Districts sometimes contest placement changes on the grounds that another district is liable. Two such cases were considered by the New Hampshire Supreme Court. In the first, the parents of a permanently institutionalized child moved and the new district argued that the cost of the placement still belonged to the former community. The court disagreed.[49] In the second, a couple sought to adopt a handicapped child, though the final adoption was not consummated. The New Hampshire court ruled that the district in which the child had lived for a year pending the unsuccessful adoption had the responsibility to pay for his residential placement.[50]

A mildly retarded, blind, twenty-year-old who had been institutionalized in Massachusetts since 1975 was transferred to a state hospital in 1981. The state department of education assigned the school committee in Amesbury, Massachusetts, the responsibility for paying for the special needs education for the person, arguing that Amesbury was the last known Massachusetts address of the student's parents. The Massachusetts appeals court upheld a lower court injunction that found the department's policy in assigning costs in the case to be without legal foundation.[51]

Parents of a mentally retarded Pennsylvania student received a list of possible private school placements for their child, but selected an alternative not on the list. The school district meanwhile took twenty-one months to develop an IEP for the student, a time interval that was unacceptable to the court. The district was ordered to pay for the placement, notwithstanding the fact that the program selected was outside the county.[52]

Finally, parents of a hearing-impaired Chicago student purchased a condominium in Skokie with the intention of enrolling their son in a Niles Township educational program. In determining that the family still resided in Chicago for educational purposes, the Illinois appeals court observed that the rest of the children in the family still went to school in Chicago and that home was the "true" family residence.[53]

4.1b Right to Education and Services

Right to education and related services cases involving handicapped students also expanded in number in 1983. Additional cases were filed testing the obligation of school districts to provide services to handicapped children beyond the 180-day standard school year. An important 1980 Third Circuit Court of Appeals case established the principle that individual handicapping conditions may require schooling in excess of 180 days.[54] Additional circuit courts of appeal gave the same reading to EHCA in 1983, even in the face of challenges to extended programs based on *Rowley*. Other cases in this area tested the definition of the "related services" required by EHCA; in two cases plaintiffs unsuccessfully sought to have school districts pay for psychiatric care.

---

[48] Murphy v. Pennsylvania Dep't of Educ., 460 A.2d 398 (Pa. Commw. Ct. 1983).

[49] *In re* Bryan L., 462 A.2d 108 (N.H. 1983).

[50] *In re* Gary B., 455 A.2d 929 (N.H. 1983).

[51] Board of Educ. v. School Comm. of Amesbury, 452 N.E.2d 302 (Mass. App. 1983).

[52] Pires v. Pennsylvania Dep't of Educ., 457 A.2d 79 (Pa. Commw. Ct. 1983).

[53] Connelly v. Gibbs, 445 N.E.2d 477 (Ill. App. Ct. 1983).

Both parties appealed a 1981 Georgia district court case that led to an injunction against Georgia's 180-day rule.[55] The lower court had invalidated the rule but had refused to issue a mandatory injunction requiring the extended-year instruction without appeals from the plaintiffs concerning the individual IEPs of students. The Eleventh Circuit Court of Appeals agreed with the lower court ruling on both points, finding first that the state's policies impermissibly erected an absolute bar to any consideration of the child's needs beyond 180 days.[56] State claims that the students needed a summer off to "recharge their batteries" were overcome by evidence that the handicapped students sometimes lost the academic gains they had made during the school year if their programs were interrupted. *Rowley*, the appeals court observed, requires that EHCA procedures be followed and that programs "reasonably calculated" to enable children to receive educational benefits be developed. The state's rule violated both tenets. The appeals court also refused to overturn the district court's refusal to issue individual injunctions, calling this portion of the ruling a "creative remedy permitted by the statute."[57]

The Fifth Circuit reached a similar reading of EHCA requirements in striking down Mississippi's 180-day rule.[58] While a lower court had decided that questions concerning the duration of services had been left to the states in EHCA, the appeals court disagreed. Such an interpretation, the court concluded, "relies on a distinction neither intimated by the Act nor suggested by its legislative history."[59] Each child must have an IEP designed following EHCA procedures, as enumerated in *Rowley*, the appeals court noted. The lower court was instructed not to evaluate the need for extended-year programs on behalf of any of the students until the state had the opportunity to provide new IEPs.

---

[54] Battle v. Pennsylvania, 629 F.2d 269 (3rd Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

[55] Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F. Supp. 1263 (N.D. Ga. 1981); *see* YEARBOOK 1982 at 131-32.

[56] Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565 (11th Cir. 1983).

[57] *Id.* at 1581.

[58] Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983).

[59] *Id.* at 1033.

A Missouri district court found that state's policy limiting schooling to 180 days violated EHCA and section 504, using reasoning similar to the two cases just discussed.[60] While refusing to issue injunctions ordering additional services for the plaintiffs, the court did require the state to consider such need. Further litigation in these cases can be expected, especially if IEPs developed for the students do not include extended-year instruction.

A Michigan state appeals court concluded that a program for handicapped children in excess of 180 days did not violate the state's Headlee Amendment, which controls contributions that the state must make to local governments for "new" programs. The court concluded that the extended program ordered by a state hearing officer could not be characterized as "new" and therefore was not covered by the amendment.[61] In another summer recess case, a federal district court in North Carolina refused to order programs for children suffering from cerebral palsy because the plaintiffs had not exhausted their administrative appeal rights.[62] The plaintiff's section 504 and EHCA claims could be heard only in the context of such an appeal.

Appeals regarding "related services" continued in 1983. Such services are required under EHCA if they are necessary to permit the public education of handicapped children. What services are required, however, is often the subject of dispute. The well-publicized case involving the catheterization of a Texas student suffering from spinal bifida reached the Fifth Circuit Court of Appeals for the second time.[63] The Irving, Texas, school system continued to argue that the procedure was "medical" in nature and therefore outside the responsibility of the schools. As in its 1980 decision,[64] the appeals court rejected this argument. This time, however, the court expressed reservations about its earlier decision, but found that there were no grounds for reversing it. In support of its decision, quoting *Rowley*, the appeals court observed that the district must provide the services to "comport with the child's IEP." Since the IEP put the student in the regular classroom, the catheterization was not unreasonable. Because the actions of the defendants denied the student her rights under section 504, the court affirmed the award of attorney's fees under section 505.

---

[60] Yaris v. Special School Dist. of St. Louis Cty., 558 F. Supp. 545 (E.D. Mo. 1983).

[61] Birmingham and Tanphere School Dists. v. Michigan Superintendent of Pub. Instr., 328 N.W.2d 59 (Mich. Ct. App. 1983).

[62] Phipps v. New Hanover Cty. Bd. of Educ., 551 F. Supp. 732 (E.D.N.C. 1982).

[63] Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983); *see* YEARBOOK 1982 at 132-33 and YEARBOOK 1983 at 157-58.

[64] Tatro v. Texas, 625 F.2d 557 (5th Cir. 1983); *see* THE YEARBOOK OF SCHOOL LAW 1981 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1981] at 143.

Two cases looked at whether psychiatric services should be considered "related services" under EHCA; each concluded that such services were not "educational." Parents of a District of Columbia student claimed that the cost of a psychiatric hospital, approximately $85,000 per year, was a related service covered by EHCA, because it permitted their child to learn, while the school district argued the contrary and offered a private program that focused on special education services, costing approximately $13,000 per year. The only issue faced by the district court, then, was whether the district was responsible for the cost of the psychiatric care. After a long review of "related services" cases, the court concluded that the district was not.[65] The court agreed with the defendants that psychiatric care was a "medical service" and that such services were to be provided under EHCA only for diagnostic and evaluation purposes. The hospitalization, then, was not an educational service and the parents were obligated for the costs. An Illinois district court reached an identical conclusion in a different case with the same facts, holding that EHCA did not require state funding of a child's treatment in a psychiatric hospital in that state.[66]

An Oregon appeals court considered the question of whether speech therapy for a four-year-old was a service that must be provided by the Salem School District.[67] The district declined to provide the service on the grounds that Oregon law did not require districts to educate handicapped children unless educational services were provided to nonhandicapped children in the same age group and that EHCA did not require the provision of services for children aged three to five.[68] After examining the Oregon statutes and EHCA in some detail, the court ruled that the Superintendent of Public Instruction acted properly in concluding that the district was not required to serve children in the plaintiff's age group, but would be obligated to provide services to such children if fifty percent or more of the age group did receive educational benefits. Because this was not the case in Salem, the services were properly denied.

Two lengthy opinions addressed the rights of persons institutionalized in facilities for the mentally handicapped in North Dakota. In a sweeping decision addressing numerous constitutional challenges, a district court ruled that the rights of inmates had been abridged in a variety of ways.[69] Of interest to the readers of this section, the court concluded that EHCA required a free appropriate education to mentally retarded citizens aged six to twenty-one and that these services had been denied the North Dakota inmates. Among a long list of changes ordered, the state was told to provide educational services. As in other cases of this type reported in recent years, a court monitor was appointed to follow the implementation of the order. Attorney's fees of over $500,000 were also awarded.[70]

---

[65] McKenzie v. Jefferson, 566 F. Supp. 404 (D.D.C. 1983).

[66] Darlene L. v. Illinois Bd. of Educ., 568 F. Supp. 1340 (N.D. Ill. 1983).

[67] Stewart v. Salem School Dist. 24J, 670 P.2d 1048 (Or. Ct. App. 1983).

[68] 20 U.S.C. § 1412; 34 C.F.R. 300.300(b)(3).

[69] Association for Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 473 (D.N.D. 1982).

The lower court's decision was upheld by the Eighth Circuit Court of Appeals.[71] At the basis of the state's appeal were arguments that the lower court had abused its discretion. In addition, the plaintiffs argued the lower court had improperly concluded that section 504 provided a basis for relief and that attorney's fees should not include prejudgment interest under section 1988. The appeals court rejected all these claims, though the fees were reduced slightly because the court decided the trial phase of the work could have been prepared in less time. The interest charges were allowed.

The EHCA requirement that state administrative appeals be concluded within thirty days led to a challenge by Illinois plaintiffs that delays in the process violated their right to a free appropriate public education. State defendants filed a motion seeking dismissal of the case.[72] The initial placement appeal, filed by the school district, was submitted in December, 1980, and was undecided as of May 1, 1981, when legal action commenced. The district court accepted the case as one that was "capable of repetition yet evading review," though the placement of the original plaintiff was settled. In looking at EHCA, the court concluded that the statute creates a private right of action to enforce its guarantees of a free appropriate education, citing a United States Supreme Court case covering right of action.[73] Because the state had not shown that the thirty-day rule was an excessive burden, the court rejected the state's motion to dismiss.

Delay in placement was also at issue in a continuing New York case.[74] The initial class action lawsuit led to an admission by the defendants that New York City had violated the rights of handicapped children by not evaluating and placing them in a timely manner. A court master was ultimately appointed to monitor the situation and both parties agreed that progress had been made. Still unresolved was the question of whether EHCA created a private right of action to enforce injunctive relief for a whole class, or whether judicial review was possible only in individual cases. The defendants also sought to be free of the court's jursidiction in the lingering case. After reviewing the progress to date, the court kept the case open and asked a newly appointed master to consider if additional sanctions against the district were appropriate. The court also affirmed that EHCA created a private right of action for classes.

---

[70] *Id.* at 495.

[71] Association for Retarded Citizens of North Dakota v. Olson, 713 F.2d 1384 (8th Cir. 1983).

[72] John A. v. Gill, 565 F. Supp. 372 (N.D. Ill. 1983).

[73] Cort v. Ash, 422 U.S. 66 (1978).

[74] Jose P. v. Ambach, 557 F. Supp. 1230 (E.D.N.Y. 1983); *see* YEARBOOK 1983 at 161.

The question of whether the state or local school districts should pay for residential placements was at the heart of an Oregon case.[75] There was no disagreement concerning the appropriateness of the placements, only whether the district in which the facility was located, the student's home district, or the state would pay. The federal district court concluded that the children were not "dependent" under ORS section 339.185(1), and therefore it was not proper that the home districts be billed. The state, the court found, had the obligation to provide supplemental funds to make the EHCA placements possible. The court gave the state ninety days in which to develop a plan to provide the funds.

Finally, the Pennsylvania Supreme Court upheld the powers of the state secretary of education to guarantee the rights of children under EHCA by certifying which private schools were eligible to receive payments for educational services provided to handicapped children.[76] The court concluded that state statutes gave the secretary ample authority to establish regulations for such schools and had justification for questioning the programs and staff qualifications at the school in question. The court also decided that the secretary did not have an obligation to review all the findings of fact presented by a hearing officer.

4.1c Discipline

As a general rule, expulsions of handicapped children are considered a "change in placement" under the terms of EHCA and procedures governing such changes must be followed. The Nebraska Supreme Court upheld a hearing examiner's decision requiring a residential placement for a severely handicapped child who was not permitted to return to his school unless his behavior changed.[77] In finding this to be the equivalent of an expulsion, the officer also extended the education due the child past his twenty-first birthday. The court held that this extension was an abuse of the examiner's discretion.

---

[75] Kerr Center Parents Ass'n v. Charles, 572 F. Supp. 448 (D. Or. 1983).

[76] Wiley House v. Scanlon, 465 A.2d 995 (Pa. 1983).

[77] Adams Cent. School Dist. v. Deist, 334 N.W.2d 775 (Neb. 1983).

4.1d Attorney Fees and Damages

A large number of cases claiming attorney fees or damages in suits involving handicapped children reached circuit courts of appeal in 1983. Some trends among the holdings in these cases are now becoming evident. It is generally agreed that EHCA does not provide grounds for either fees or damages. Parallel claims filed under sections 504 and 505 of the Rehabilitation Act of 1973 are meeting with increasing lack of success, with many jurisdictions ruling that suits that prevail under the terms of EHCA cannot then use section 504 violations that were secondary to the EHCA grounds in the original suit to claim fees. Claims raising Civil Rights Attorney's Fees Award Act sections 1983 and 1988 issues were also less successful last year, with courts increasingly holding that because Congress did not include fees and damages within EHCA, parallel section 1983 claims could not be accepted.

A 1981 Seventh Circuit Court of Appeals case is frequently employed as justification by courts that do award damages in EHCA cases.[78] The case established the principle that relief under EHCA was limited to an injunction regarding the child's program or placement. Two "exceptional circumstances" might permit an additional award—when the child's health was endangered by the actions of the state or when the state acted in extreme bad faith by ignoring EHCA provisions. In cases awarding damages in 1983, school districts fell into one or the other of these categories.

Four circuit court of appeals cases addressed the question of fee recovery principally under section 504. This issue was clearly confronted in a First Circuit Court of Appeals case that examined a district court award of $32,109 in attorney fees.[79] The appeals court first tackled the section 1988 claim, citing the "American Rule" that attorney fees are available only when statutory authority so provides.[80] EHCA clearly does not contain such authority. The court went on to conclude that even were the section 1983 claims "substantial," that would not provide support for the fees if the section 1983 claims were factually identical to the EHCA claims. As the appeals court summarized the issue, "Plaintiffs' mere recitation of a section 1983 claim cannot create a right to attorney fees in litigation as to which Congress, perhaps recognizing the shortness of school funds, has not seen fit to make a special award."[81]

---

[78] Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981); *see* YEARBOOK 1983 at 160-61.

[79] Smith v. Cumberland School Comm., 703 F.2d 4 (1st Cir. 1983).

[80] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

[81] Smith, *supra* note 79 at 8.

The appeals court made a similar finding with regard to the section 504 claims. The court held that EHCA was the comprehensive act specifying the rights of handicapped children. Even if section 504 provides for a private right of action, which the court found an undecided issue, there could be no "fee shifting" to section 504 to make the award possible.

An Eleventh Circuit Court of Appeals case concluded that no exceptional circumstances were present that would justify an award of damages to the parents of a child who was first diagnosed as learning disabled and then returned to a regular classroom.[82] The parents asked for special services to enable the child to "catch up" with his age group. In dismissing this request, the court found nothing in EHCA that required programming for a previously handicapped child. The appeals court also rejected the plaintiff's section 504 claim, noting that it was moot because the student had been removed from special education.

Two other circuit courts of appeals also held that EHCA provides the exclusive remedy in cases involving handicapped children and that the act precludes punitive damages. The Fifth Circuit Court of Appeals considered a request from plaintiffs for tuition and for punitive damages.[83] The tuition was refused because the parents had unilaterally moved their child to the private placement. The parents also claimed that they were entitled to damages because the school system should have recognized the fact that their son was emotionally disturbed and eligible for special services. The court held that Congress did not intend states to be subjected to punitive damages which would "divert even more funds from the primary goal of educating handicapped children."[84] Because there was no intentional discrimination, the court rejected the section 504 claim and further held that section 1983 could not be used as a vehicle to enforce EHCA violations.

The Seventh Circuit Court of Appeals considered a case in which additional compensatory education was sought by parents of a profoundly retarded, institutionalized, twenty-one-year-old.[85] The court concluded that the costs of compensatory education could not be recovered for the same reasons that damages could not be recovered. Citing their 1981 decision,[86] the court held that bad faith by the district might lead to an award, but that claims that the district in this case had engaged in bad faith were totally unfounded. The appeals court went on to join other circuits in concluding that EHCA, not section 504, was the exclusive remedy for procedural deficiencies in EHCA placements.

---

[82] Powell v. Defore, 699 F.2d 1078 (11th Cir. 1983).

[83] Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348 (5th Cir. 1983).

[84] *Id.* at 1356.

[85] Timms v. Metropolitan School Dist. of Wabash Cty., 718 F.2d 212 (7th Cir. 1983).

[86] Anderson, *supra* note 78.

A variety of federal district courts also addressed claims for damages in 1983. Courts in Illinois,[87] Florida,[88] Delaware,[89] and Connecticut[90] all concluded that section 504 did not provide a separate right to recovery of fees and damages when EHCA claims were advanced. Only the Illinois decision was reached sufficiently late to base its decision, in part, on the circuit courts of appeal decisions already discussed in this section. The other courts, as one judge put it, undertook the "foray into the morass" of previously conflicting opinions and reached decisions congruent with the appeals courts.

In a case decided without benefit of the Fifth Circuit Court of Appeals section 504 decision reported above, a Texas district court held that section 504 provided the authority for an award of over $24,000 in private school tuition costs to the parents of a handicapped child.[91] A school psychologist had recommended a private placement for the learning disabled child, but the system offered placement in a class for the mentally retarded. The child attended private school for four years before the parents again contacted the school system regarding an alternative placement. The court concluded that offering a placement in a class of mentally retarded students to a nonretarded student was a prima facie case of section 504 violation. Whether the school district's action was "exceptional," permitting the award, remains to be seen.

Parents of a learning-disabled Michigan child also brought suit under section 504 alleging an improper diagnosis and placement. The defending school system moved for a summary judgment stating, among other claims, that state statutes requiring the filing of suit within three years of an injury should apply since neither section 504 nor EHCA contains a limit on the time during which actions may be brought. After concluding that EHCA claims could not be brought under section 1983, the court held that section 504 potentially did provide such grounds.[92] The court also ruled that the issue of statutory limitations could not be decided because the facts in the case were disputed. The court therefore denied the request for summary judgment. Likewise, a Georgia court denied a motion for a summary judgment filed by school defendants in a case involving damages under section 504.[93] The court concluded that the defendants had ignored a state hearing officer's placement recommendation, but could not decide which federal statutes provided the basis for relief in the case.

---

[87] William S. v. Gill, 572 F. Supp. 509 (N.D. Ill. 1983).

[88] Manecke v. School Bd. of Pinellas Cty., 553 F. Supp. 787 (M.D. Fla. 1983).

[89] Rollison v. Biggs, 567 F. Supp. 964 (D. Del. 1983).

[90] Flavin v. Connecticut State Bd. of Educ., 553 F. Supp. 827 (D. Conn. 1983).

[91] David H. v. Spring Branch Indep. School Dist., 569 F. Supp. 1324 (S.D. Tex. 1983).

[92] Sanders v. Marquette Pub. Schools, 561 F. Supp. 1361 (W.D. Mich. 1983).

[93] Christopher N. v. McDaniel, 569 F. Supp. 291 (N.D. Ga. 1983).

The Eleventh Circuit Court of Appeals confronted the narrow issue of whether section 1983 could be used as grounds for the payment of attorney fees in an Indiana EHCA case.[94] The appeals court concluded that EHCA provided all the relief that was ncessary to bring deficient procedures into conformity with the act. Therefore the court held that section 1983 was superfluous to the plaintiff's case and could not serve as the basis for fee recovery. An Indiana district court reached the same conclusion in a different case, holding that section 1983 did not supply the authority for a fee award.[95] The court stated that it "deplored" the lack of an exception to the rule, having concluded that the plaintiffs' damage claim was "meritless" and that they had litigated in bad faith.

Exceptional circumstances warranting the payment of fees and damages were found by a district court in Rhode Island.[96] A mentally and physically handicapped child was not provided with transportation to and from school for three years while his family struggled to transport him in a family vehicle. Because the mother was unable to maneuver the child's wheelchair, he was forced to wait in the van until his father's workday ended so that he could be lifted from the van into the house. The court found that the parents had repeatedly sought the required transportation service from the school system, to no avail. The court therefore held that EHCA provided the grounds for the recovery of transportation costs and that section 504 authorized payment of just under $20,000 in damages, plus reasonable attorney fees.

In a second case involving exceptional circumstances, the Second Circuit Court of Appeals considered a case in which the plaintiff was denied the opportunity for an EHCA hearing when a school district employee checked a box on a form indicating that the parent did not wish her child to be evaluated, having induced the parent to sign the form with the box unchecked. The Second Circuit majority concluded that this action entitled the parent to section 504 relief.[97] In a dissent to this conclusion, the minority opinion argued that the proper course for the plaintiff was an administrative appeal, rather than a trip to federal court for damages. The case was remanded to the district court for further consideration.

In an Illinois "bad faith" case, a district court weighed claims that a school district should pay damages for willfully violating EHCA rules in preparing the student's IEP, including the charge that the parents were not given an opportunity to participate in the process.[98] The student was then given a diploma without, the parents argued, having received the services required by the IEP. While holding that the parents might be able to recover the tuition charge they incurred for following the IEP, the court dismissed a variety of other claims based on section 504, section 1983, and state law. The case was continued for further arguments on the bad faith claims.

---

[94] Doe v. Koger, 710 F.2d 1209 (11th Cir. 1983).
[95] Benner v. Negley, 556 F. Supp. 749 (N.D. Ind. 1983).
[96] Hurry v. Jones, 560 F. Supp. 500 (D.R.I. 1983).
[97] Quackenbush v. Johnson City School Dist., 716 F.2d 141 (2d Cir. 1983).

Parents sought reimbursement for tuition charges in an Illinois appeals court case, claiming that their child's health was endangered by the school system's placement decision.[99] While a student's endangered health may be an "exceptional circumstance" requiring such a payment, the court found that the parents had not demonstrated that their child's health was jeopardized. Likewise, the school's early failure to comply with EHCA procedures was not a sufficiently serious error as to provide grounds for the claim.

Two fees and damages cases relied on interpretation of state statutes for their resolution. In the first, the Ninth Circuit Court of Appeals held that the thirty-day limit within which administrative appeals must be filed under the Hawaii Administrative Procedures Act applied to EHCA cases.[100] The case followed a Hawaii Supreme Court decision reported last year holding that the state was a "person" entitled to appeal an administrative decision under the Hawaii Act.[101] Finally, a Pennsylvania court held that there was no right to recover damages for an allegedly faulty placement of a handicapped child under the provisions of the Pennsylvania School Code.[102]

4.2 PUBLIC SCHOOL ASSIGNMENT, TUITION, AND TRANSPORTATION

4.2a Tuition and Assignment

A dispute over a student's entitlement to tuition-free admission to public schools in Texas was heard by the United States Supreme Court in 1983.[103] The Court, in *Martinez v. Bynum*, affirmed the decisions of the district court and the Fifth Circuit Court of Appeals, holding that the residency requirement Texas imposed on would-be public school students was constitutional.[104] The residency requirement denied tuition-free admission to public schools to minors who lived apart from a "parent, guardian, or other person having lawful control" if the minor's presence in the school district is "for the primary purpose of attending the public free schools."[105]

---

[98] Max M. v. Thompson, 566 F. Supp. 1330 (N.D. Ill. 1983).

[99] Teplitz v. Mount Prospect Elem. School Dist. No. 57, 453 N.E.2d 871 (Ill. App. Ct. 1983).

[100] Hawaii Dep't of Educ. v. Carl D., 695 F.2d 1154 (9th Cir. 1983).

[101] *In re* Eric G., 649 P.2d 1140 (Hawaii 1983); *see* YEARBOOK 1983 at 155.

[102] Lindsay v. Thomas, 465 A.2d 122 (Pa. Commw. Ct. 1983).

[103] Martinez v. Bynum, 103 S. Ct. 1838 (1983).

The student involved, Roberto Morales, was a United States citizen who had resided with his parents in Mexico for several years. In 1977 Morales returned to Texas to live with his sister, who was not and did not wish to become Morales' guardian. Lower courts determined that Morales' presence in Texas was primarily motivated by a desire to attend the public schools.

The Court distinguished the Texas statute from previously invalidated durational residence requirements. Durational residence requirements have been struck down because they create "distinct and independent prerequisites" to state benefits.[106] Citing the need for local control over schools, the Court approved the Texas requirement because it furthered the "substantial state interest in assuring that services provided for its residents are enjoyed only by residents."[107] The policy was considered a bona fide requirement since it required only that a person establish residence to obtain services restricted to residents. The Court noted that residence requires both physical presence and an intention to remain and held that the Texas statute required only that those conditions be met before a student was admitted to the free, public schools.

A similar case was litigated in North Carolina.[108] North Carolina statutes allow admission to public schools only after a student has established domicile in the school district. The establishment of domicile requires that either the student's parents or guardian have made a permanent home in the school district. A student who lived with an aunt who was not the student's guardian sought admission to the public schools.

Citing the Surpeme Court's *Martinez* decision, the district court found the North Carolina requirement to be a "reasonable standard for determining the residential status of students in the public schools."[109] The district court also found its decision bolstered by the Supreme

---

[104] Arredondo v. Brockette, 482 F. Supp. 212 (S.D. Tex. 1979), *aff'd*, 648 F.2d 425 (5th Cir. 1981).

[105] TEXAS EDUC. CODE § 21.031(d) (1982).

[106] Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

[107] Martinez, *supra* note 103 at 1842.

[108] Harris v. Hall, 572 F. Supp. 1054 (E.D.N.C. 1983).

[109] *Id.* at 1057.

Court's holding that "public education is not a right granted to individuals by the Constitution."[110]

Parents in Vermont appealed a decision of the state board of education[111] denying their request that the local school board pay tuition for their son to attend a private school other than the private school designated as the town's public school. The decision of the state supreme court revolved about several technical issues arising out of the ruling of a lower court. Holding that there was no constitutional right "to be reimbursed by a public school district to attend a school chosen by a parent,"[112] the Vermont Supreme Court dismissed the suit.

In a similar case an Arkansas appeals court held that students could not reside in one school district and attend school in a different district.[113] The court determined that residency was not established by the payment of tuition or by the appointment of "school guardianships."

A court in New York considered the case of a student who had been living with a family friend in New York since the death of his father.[114] The student's mother was a Jamaican citizen and the family friend was appointed as the student's guardian. The court decided that the guardianship constituted bona fide residence and allowed the student to continue attending the public schools.

An Illinois court considered a complicated suit that involved students seeking to attend schools outside their home districts.[115] The Niles school district was in the process of attaching a portion of the district to an adjacent school district. The new school district unilaterally accepted all students in the area and the Niles district sought an injunction to prevent this policy from taking effect. The Niles school district charged it would suffer from the loss of students prior to completion of the detachment proceedings. Parents of the students intervened in the suit against the Niles board, asserting that their children had a right to attend the schools of their choice. The court found that no enforceable right for nonresident students to attend out-of-district schools on a tuition-free basis existed.[116]

A student in South Carolina filed suit contesting the imposition of a tuition charge at a public school summer session.[117] Following similar decisions in such cases decided in other states, the state supreme court found that "the summer school was not a part of the free public school system;" therefore, the state was not required to make it available to children free of charge.[118] Additionally, the court held that attendance in a summer school was not a fundamental right.

---

[110] Plyler v. Doe, 457 U.S. 202, 221 (1981).

[111] Mason v. Thetford School Bd., 457 A.2d 647 (Vt. 1983).

[112] *Id.* at 649.

[113] Delta Sp. School Dist. v. McGehee Sp. School Dist., 659 S.W.2d 508 (Ark. 1983).

[114] *In re* Moncrieffe, 467 N.Y.S.2d 812 (N.Y. Sup. Ct. 1983).

[115] Board of Educ. of Niles Twp. v. Board of Educ. of Northfield Twp., 445 N.E.2d 464 (Ill. App. Ct. 1983).

[116] *Id.* at 472.

[117] Washington v. Salisbury, 306 S.E.2d 600 (S.C. 1983).

The suspension of a student from school for failing to pay textbook fees was successfully challenged in Indiana.[119] The student alleged that the suspension amounted to a denial of equal protection. The court upheld the challenge on this ground and found that since suspension for failure to pay fees was not sanctioned by Indiana law, the student did not have to exhaust all administrative remedies.

Disputes over the placement of children in schools also resulted in litigation in 1983. Parents of a five-year-old child in Pennsylvania sued to force the school to enroll the child in kindergarten.[120] Analyzing state law, the court determined that a school district was required to provide free public education to resident children who were at least six years old.

A private school student in Michigan filed suit to gain admission to a public school band class.[121] The student alleged that the refusal of the school district to offer her "shared time" band instruction denied her equal protection of the law. The court rejected this claim, noting that under Michigan statutes the initial decision to offer shared time instruction was discretionary with the local school district. Only after shared time instruction was offered were constitutional structures of equal and nondiscriminatory treatment imposed.

The Nebraska Supreme Court pondered a family's freehold transfer petition.[122] A farmer with land in two school districts petitioned to have the land his residence stood upon transferred to the adjacent school district. The petition asserted that the transfer would be in the "best educative interest" of one of the children. The court found a significant amount of evidence confirming that the transfer would indeed be in the student's best interest and granted the transfer.

The same court reached a similar conclusion in another freehold transfer case.[123] The court announced that a freehold petition must be supported by an adequate showing that the transfer would be in the "best educative interest" of the student. Testimony by the parents and school officials that the transfer would be beneficial convinced the court to uphold the petition.

---

[118] *Id.* at 601.

[119] Carder v. Michigan City School Corp., 552 F. Supp. 869 (N.D. Ind. 1982).

[120] Goldsmith v. Lower Moreland School Dist., 461 A.2d 1341 (Pa. Commw. Ct. 1983).

[121] Snyder v. Charlotte Pub. School Dist., 333 N.W.2d 542 (Mich. Ct. App. 1983).

[122] *In re* Freeholder Petition, 330 N.W.2d 907 (Neb. 1983).

[123] *Id.* at 481.

4.2b Transportation

Two Pennsylvania cases constituted the transportation cases for 1983. In the first, a legal challenge to one-way kindergarten busing returned to a district court following remand by the Third Circuit Court of Appeals. The district court had originally concluded that education was a fundamental right and that the busing plan created a "suspect classification" in violation of the fourteenth amendment because lower-income families could not afford the one-way charge, which was left to the families.[124] The appeals court rejected both parts of the district court's analysis and remanded the case for consideration of state statutory issues.[125]

In looking at the Pennsylvania Public School Code, the district court found language giving school districts the power to provide transportation "to and from kindergarten." The fact that the district was not required to provide the transportation, however, did not permit it to modify the code by providing only one-way busing. Thus the court concluded that the kindergarten busing must be both to and from school, if it is offered at all.[126] After issuing an injunction in the case, the court kept jurisdiction to ensure that its orders were followed.

In the second case, the parents of a Pennsylvania student enrolled their child in a neighboring public school district, agreeing to pay tuition for the privilege, but then sought to have their home district pay for their son's transportation. A court of first impression agreed with the parents, and the school district appealed. This first appeal was rejected on the grounds that Pennsylvania law required that free transportation be provided within a district or within a ten-mile radius of the district.[127] The appeals court also rejected the district's attempt to enter additional arguments in the case. Nine months later the case was heard by the Pennsylvania Supreme Court, which reversed the lower courts.[128] The Pennsylvania high court concluded that the ten-mile provision of the law in question applied to nonpublic school children, but that the transportation of public school children outside their district was not required.

4.2c Compulsory Attendance

Compulsory attendance cases have grown in number in recent years as parents seek to enroll their children in nontraditional religious schools or to educate them at home. Arguments sometimes ensure as parents claim these arrangements offer "equivalent instruction" to that obtained in the public schools, while local districts and state education departments argue the opposite. First amendment free exercise of religion claims sometimes are advanced, but courts have been reluctant to expand the holdings in *Yoder v. Wisconsin*,[129] which established narrow grounds under which compulsory attendance laws must give way to first amendment arguments.

---

[124] Shaffer v. Board of School Dirs., 522 F. Supp. 1138 (W.D. Pa. 1981).

[125] Shaffer v. Board of School Dirs., 687 F.2d 718 (3d Cir. 1982); *see* YEARBOOK 1983 at 167.

[126] Shaffer v. Board of School Dirs., 570 F. Supp. 698 (W.D. Pa. 1983).

[127] Babcock School Dist. v. Patocki, 455 A.2d 273 (Pa. Commw. Ct. 1983).

[128] Babcock School Dist. v. Patocki, 455 A. 2d 616 (Pa. 1983).

Six state high courts heard challenges to compulsory attendance laws; four of the cases sustained the laws while two state supreme courts found their state's definitions of private school impermissibly vague. In North Dakota, parents challenged a requirement that teachers must be certified, arguing that the law negated their free exercise of religion because they believed the Bible required them to educate their children in certain Christian ways and that the state would be disrupting their religion if it required teacher certification.[130] Certification, they alleged, would substitute the word of the state for the rule of God. The North Dakota court disagreed, noting that "the freedom to hold religious beliefs is absolute . . . [but] the freedom to act, even if the action is in accord with religious conviction, is not totally free from legislative restrictions."[131] The court found that the defendants had not shown how the certification requirements interfered with their religious beliefs.

The Virginia Supreme Court held that children taught at home must be educated by tutors or teachers whose credenitals were approved.[132] The parents had alleged that the quality of instruction at their home was superior to that available in the public schools. The Virginia court also refused to consider the state's definition of a private school because the situation was governed by the state statute related to home instruction. In a similar case, the Supreme Court of Kansas upheld a decision that children were "in need of care" when their mother withdrew them from school to teach them at home.[133] Kansas law regulating private schools requires education by a "competent instructor," which the court found lacking in this case.

Likewise, the Nebraska Supreme Court rejected a defendant's plea for a continuance and affirmed a lower court order enjoining her from operating a school in her home.[134] The school in question served only

---

129. 406 U.S. 205 (1972).
130. North Dakota v. Rivinius, 328 N.W.2d 220 (N.D. 1982).
131. *Id.* at 223.
132. Grigg v. Virginia, 297 S.E.2d 799 (Va. 1982).
133. *In re* Sawyer, 672 P.2d 1093 (Kan. 1983).
134. State *ex rel.* Douglas v. Bigelow, 334 N.W.2d 444 (Neb. 1983).

the defendant's daughter. The court concluded that the state requirement that all teachers be certified did not conflict with the first or other amendments to the constitution.

In the first of two cases with different outcomes, the Wisconsin Supreme Court considered a case in which it was alleged that the state's definition of a private school was impermissibly vague. In previous years, state appeal courts had ruled that the statute was not overly broad,[135] but the case at hand represented the first time the Wisconsin high court had addressed the question. The case arose from the attempts of a mother to enroll her daughters at the Free Thinker School, which was affiliated with the Church of the Free Thinker. In looking at Wisconsin statutes, the court could find no definition of the term "private school" and no criteria under which local school administrators were to decide if a school in their area should be defined as such a school. The court therefore concluded that the definition was a legislative matter and reversed the conviction of the parents for violating the state's compulsory attendance law.[136]

In a case that made frequent reference to the case just discussed, the Supreme Court of Georgia also ruled that state statutes failed to define what constituted a private school.[137] Plaintiffs in the case had defined their home as a private school. While the state agreed that a formal definition was lacking in the statutes, they argued that a person of "ordinary intelligence" would know that such a school was one in which tuition was paid for education. In a 4-3 decision, the court disagreed with this argument, holding that the lack of a definition meant that prosecution could not be undertaken. As in Wisconsin, Georgia does not require private school instructors to be certified.

Two North Carolina cases addressed that state's compulsory attendance law. Parents who declared their home a private school for religious and "sociopsychological" reasons were denied an injunction by the Court of Appeals of North Carolina, which concluded that the parents had not raised significant first amendment issues.[138] Similarly, the Fourth District Court of Appeals held that parents who were members of a church that had no objection to public school education could not claim religious reasons for wishing to educate their children at home.[139] The appeals court decided that home instruction would not make the children "self-sufficient participants in our modern society."[140]

---

[135] *See* Wisconsin v. White, 325 N.W.2d 76 (Wis. Ct. App. 1982); *see* YEARBOOK 1983 at 171.

[136] Wisconsin v. Popanz, 332 N.W.2d 750 (Wis. 1983).

[137] Roemhild v. Georgia, 308 S.E.2d 154 (Ga. 1983).

[138] Delconte v. North Carolina, 308 S.E.2d 898 (N.C. Ct. App. 1983).

[139] Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983).

[140] *Id.* at 99.

A New Mexico appeals court considered arguments that the failure to permit home instruction violated the equal protection clauses of the state and federal constitutions. Employing the rational relationships test, the court concluded that compulsory education had sufficient justification, even though the state legislature had not compiled any legislative history when it enacted the New Mexico compulsory education law.[141]

A Louisiana appeals court ruled that school boards in that state had to initiate criminal proceedings or civil proceedings, followed by possible contempt charges, when parents failed to send their children to school.[142] A parish school board had sought a monetary judgment against parents for withdrawing their child from school.

Finally, in a different sort of case, a Pennsylvania court considered a suit filed by parents regarding family vacations.[143] The school district's policy permitted one educational trip of no longer than five days. The parents, however, took trips to the Caribbean, New England, Washington, D.C., and Europe, taking their children with them. As a result, they were fined a total of eight dollars, plus costs. Finding that neither logic nor law permitted the parents to flout the district's attendance policy, the court upheld the award.

4.3 BILINGUAL-BICULTURAL PROGRAMS

Chapter 1 of the Education Consolidation and Improvement Act of 1981, formerly Title I of the Elementary and Secondary Education Act, contains language requiring states to have parent advisory councils to advise them on the operation of migrant education programs funded under Chapter 1.[144] The Wisconsin Superintendent of Public Instruction established an Advisory Council on Migrant Education, but refused to create a parent advisory council on which a majority of the members were migratory parents or students, as was the case on the old Title I advisory council. In response to a suit seeking an injunction to require a council with controlling migrant representation, the Wisconsin superintendent claimed that private individuals could not file suit to enforce the provisions of Chapter 1 and that Congress did not intend to continue the parent advisory council when it recreated Title I as Chapter 1.[145]

---

[141] New Mexico v. Edgington, 663 P.2d 374 (N.M. Ct. App. 1983).
[142] Livingston Parish School Bd. v. Lofton, 422 So. 2d 1357 (La. Ct. App. 1982).
[143] Pennsylvania v. Hall, 455 A.2d 674 (Pa. Super. Ct. 1983).
[144] 20 U.S.C. § 3801, § 2762(a)(4) (1981).
[145] Valdez v. Grover, 563 F. Supp. 129 (E.D. Wis. 1983).

The district court quickly concluded that section 1983 permitted suits to address alleged violations of federal statutory law. The plaintiff had children who were among the intended beneficiaries of the migrant programs and the court concluded she had standing to sue. On the merits of her case, the court concluded that Congress had indeed removed the parent advisory council requirement for other Chapter 1 programs but had not clearly done so for the migrant education programs. Thus, in spite of the "administrative difficulties" that were present, the court issued a preliminary injunction requiring the creation of a council with controlling migrant community representation.

4.4 PRIVATE AND PAROCHIAL SCHOOLS

State involvement with private and parochial schools was at the center of several court cases in 1983. The issues of shared instructional materials, private school autonomy over its own discipline procedures, and bus transportation of nonpublic school children were litigated.

A struggle was waged in the First Circuit Court of Appeals over busing for private school pupils.[146] A Rhode Island statute divided the state into five regions. Busing was provided for nonpublic school students who attended a school within the confines of the region, even if the school was located outside the student's local school district. Public school students could be bused to a school outside their district only under special circumstances. Most of the private schools benefitting from the law were religious in nature. Hence, it was charged that the law was an illegal governmental support of religion.

The familiar three-part test of *Lemon v. Kurtzman* was applied by the court.[147] The test dictates that a statute must have a secular legislative purpose; second, its principal effect must neither advance nor inhibit religion; and third, the law must not provoke an excessive government entanglement with religion or excessive political divisiveness along religious lines. The court decided that the busing statute did have a secular motivation in that it sought to "protect the health, safety and welfare of pupils who live at such distances from the schools they attend as to make it impractical or hazardous to require the pupil to walk to school."[148]

The second prong of the test created more trouble. To pass the test, the busing mandated by the law would have to be "supplied in common to all students."[149] The district court invalidated this busing plan, in part, because interdistrict transportation was not equally provided to public school students.[150] The United States Supreme Court had allowed several similar cases that conferred extra benefits on parochial school students to stand.[151] The degree of tolerable disparity is, however, limited. The court held that public and parochial students had to be eligible for busing on the same terms: "[I]f distance is the criterion and sectarian students living a certain distance from their school are eligible for busing at public expense, public students living the same distance from their school must likewise be eligible."[152] Nonetheless, after appearing to support the plaintiffs, the appeals court upheld the statute, declaring that the Rhode Island law did not have a primary effect that advanced religion. The court also found that the busing policy did not entail an excessive or impermissible entanglement between government and religion. However, concern was expressed over the religious and political divisiveness that the busing controversy engendered.

---

[146] Members of Jamestown School Comms. v. Schmidt, 699 F.2d 1 (1st Cir. 1983).

[147] 403 U.S. 602 (1971).

[148] Schmidt, *supra* note 146, at 6.

West Virginia's highest court considered a similar case.[153] Parents petitioned the court to require school bus transportation for their children to and from their parochial schools. The county provided other forms of transportation for nonpublic school students. The court held that the provision of bus transportation for parochial school students did not violate the first amendment. However, the court overruled the precedent of a prior case and announced that "the equal protection clause is not violated by failure of a state to aid and support parochial or private schools."[154] The court decided that the mandate of West Virginia law that required "adequate means of transportation, for all children of school age" did not require identical modes of transportation for all students.[155]

A Wisconsin court also addressed the issue of "reasonable uniformity" in the provision of transportation to public and private schools.[156] The Janesville school board appealed a decision dictating

---

149. Everson v. Board of Educ., 330 U.S. 1, 17 (1947).

150. Members of Jamestown School Comms. v. Schmidt, 525 F. Supp. 1045 (D.R.I. 1981).

151. Springfield School Dist. v. Pennsylvania Dep't of Educ., 397 A.2d 1154 (Pa. 1979), *cert. denied*, School Dist. of Pittsburgh v. Pennsylvania Dep't of Educ., 443 U.S. 901 (1979); Pequea Valley School Dist. v. Pennsylvania Dep't of Educ., 397 A.2d 1154 (Pa. 1979), *cert. denied*, 443 U.S. 901 (1979).

152. Schmidt, *supra* note 146 at 9.

153. Janasiewicz v. Board of Educ. of Cty. of Kanawha, 299 S.E.2d 34 (W. Va. 1983).

154. *Id.* at 36; the court reconsidered State *ex rel.* Hughes v. Board of Educ., 174 S.E.2d 711 (W. Va. 1970).

155. W. VA. CODE § 18-5-13 (6)(a) (1982).

156. Saint John Vianney School v. Board of Educ. of School Dist. of Janesville, 336 N.W.2d 387 (Wis. Ct. App. 1983).

that similar transportation must be provided under similar circumstances for both public and private school pupils. Wisconsin statutes require that transportation be provided to all students with "reasonable uniformity."[157] The school board provided school bus transportation for public school students who lived two or more miles from school. Students attending private schools two miles away were provided transportation through free use of the city bus system and parent/guardian contracts. The court rejected the claim that students using the city bus system were exposed to more risks than students who rode school buses. The court held that "reasonable uniformity" applied only to the distance criteria, not the mode of transportation.

In a final busing case, a New York court upheld a school district's right to deny free transportation to private school students who applied for transportation after a prescribed deadline. The court held that the students had not provided a reasonable explanation for the delay.[158]

The Kentucky Supreme Court considered the constitutionality of the state's textbook-sharing arrangement with private schools.[159] The policy allowed the state to supply textbooks to private schools upon request of the private school. The court found that the scheme offended the establishment clause. Because the state aid flowed directly to parochial schools, the program illegally supported religion. The court held that Supreme Court precedents applied only where aid flowed directly to a private or parochial school student.[160]

In Georgia, a parochial school student challenged his expulsion from the school.[161] The student and several of his classmates had a "beach party" in lieu of participation in the senior class trip. They left a rented apartment "damaged, dirty, and strewn with beer cans and whiskey bottles, pornographic magazines, vomit, and other litter."[162] The students were expelled for their conduct because drinking alcoholic beverages and immoral conduct were both dismissal offenses under the school's rules. The court rejected the claim that the expulsion had been unfair, noting the opportunities given to the student to refute the charges against him.

---

[157] WIS. STAT. ANN. § 121.54(1) (1982).

[158] Board of Educ., Hauppauge Union Free School Dist. v. Ambach, 462 N.Y.S.2d 294 (N.Y. App. Div. 1983).

[159] Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983).

[160] *See* Board of Educ. v. Allen, 392 U.S. 236 (1968).

[161] Spell v. Bible Baptist Church, Inc., 303 S.E.2d 156 (Ga. Ct. App. 1983).

[162] *Id.* at 157.

4.5 SCHOOL SPORTS

4.5a State Athletic and Activity Associations

Courts continued to support rules promulgated by state athletic associations in 1983. Students who challenged transfer rules, roster limits, and the actions of coaches remained unsuccessful in convincing courts that there is a constitutional right to participate in interscholastic athletics.

The Fifth Circuit Court of Appeals, for example, ruled that a student had no property interest in playing for the school football team.[163] The student's mother moved from Springbranch, Texas, to California in the fall of 1981. The student stayed behind and played varsity football. He rejoined his mother in California in December of that same year. He returned to Springbranch in August 1982 and again played football. In November, 1982, the University Interscholastic League declared the student to be ineligible to participate in interscholastic athletics, noting that students must maintain residency in a school district for one year prior to participation in interscholastic athletics.

Determining that the league's rules promoted the legitimate state interest of equalizing competition among participating schools, the court upheld the league's residency requirement. The student had claimed that the rule unconstitutionally restricted his right to travel and impinged upon his right to family privacy. The district court had dismissed the suit in an unpublished opinion, finding that it lacked subject matter jurisdiction. Drawing heavily from a prior Fifth Circuit case, the court also determined that the student's protected rights had not been abridged.[164] In the earlier case the Fifth Circuit Court of Appeals had upheld a similar residency requirement in Louisiana.

In another 1983 case, a Pennsylvania court upheld a similar transfer rule.[165] The Pennsylvania athletic association's rule disallowed school transfer when those transfers were athletically motivated. A student, declared ineligible by the association under the rule, claimed his due process rights had been violated by the decision. The court ruled that before a person is entitled to procedural due process an identifiable property right must be demonstrated.[166] Athletic competition was not such a right. In spite of the holding in this case, courts have generally

---

163. Niles v. University Interscholastic League, 715 F.2d 1027 (5th Cir. 1983).

164. *Id.* at 1030; Walsh v. Louisiana High School Athletic Ass'n, 616 F.2d 152 (5th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981).

165. Pennsylvania Interscholastic Athletic Ass'n v. Greater Johnstown School Dist., 463 A.2d 1198 (Pa. Commw. Ct. 1983).

166. *Id.* at 1201; *see also* Bunting v. City of Columbia, 639 F.2d 1090, 1093 (4th Cir. 1981).

required due process in residency cases because the actions of athletic associations constitute state action.

The Florida Supreme Court considered a challenge to a state activities association rule limiting the number of players who could be used by high school football teams during play-off competition.[167] The association limited each team's roster to forty-four players for play-off games. A student who did not make the cut challenged the rule, asserting that the rule denied him equal protection under the law. A lower court had agreed and invalidated the rule.[168]

The Florida high court held that, "as there is no constitutional right to play football or to participate in post-season football play-offs," the association needed only to demonstrate that the roster limit was rationally related to a legitimate state purpose.[169] The association argued that the rule reduced the costs of play-off contests, promoted fair play, and prevented violence during the games. Finding no compelling evidence to discredit the rule, the court upheld the roster limit.

Courts generally follow a "rational basis" standard in considering the rules imposed by coaches on their teams. An Illinois elementary school basketball coach required players to attend practice except in case of illness or death in the player's family. Those who missed practice were not allowed to dress for the next scheduled game. A player whose weekly catechism class conflicted with the team practice alleged that the rule abridged his right to freedom of religion.[170] Additionally, the student charged that the rule was arbitrary and did not bear a rational relationship to a legitimate school objective. The court dismissed the allegation of arbitrariness:

> The primary importance of the rule to the school program is that the rule promotes attendance at practice and as a result instills in young athletic participants a sense of teamwork and an appreciation of the individual's responsibility to the group. Promoting these qualities in each individual should be part of every elementary school education.[171]

The charge that the player's freedom of religion was abridged was weighed against the school's legitimate concern with the development of a pupil's character. The court considered the sincerity of the student's religious claim and the degree to which the challenged regulation interfered with a "vital religious practice."[172] The court concluded that the student's catechism classes were a matter of personal preference, not of religious necessity. The court reasoned that "it is not mandatory that a fifth grade child attend a formal catechism class."[173] Since the religious practice was discretionary, the practice attendance rule survived the free exercise challenge.

---

[167] Florida High School Activities Ass'n v. Thomas, 434 So. 2d 306 (Fla. 1983).

[168] Florida High School Activities Ass'n v. Thomas, 409 So. 2d 245 (Fla. Dist. Ct. App. 1982); *see* YEARBOOK 1983 at 181.

[169] *Id.* at 308.

[170] Keller v. Gardner Commun. Consol. Grade School Dist., 552 F. Supp. 512 (N.D. Ill. 1982).

[171] *Id.* at 515.

In an unusual case, a New York student claimed her civil rights were violated by her high school basketball coach's failure to write a letter of recommendation.[174] The student alleged that the coach's negligence cost her a basketball scholarship. The court held that the coach was not required to write a recommendation since the student had no identifiable right to a college scholarship.

4.5b Sex Discrimination

Cases concerning sex discrimination in school athletics have declined in numbers in recent years. Arguments continue to be raised, however, as to whether sex-segregated teams for girls and boys can be justified as enhancing athletic opportunities or whether these teams violate Title IX of 20 U.S.C. § 1681. These issues were raised in a 1983 Arizona case.

Male students challenged the Arizona Interscholastic Association's (AIA) prohibition of boys playing on girls' athletic teams.[175] The AIA allows girls to play on boy's teams in noncontact sports, but boys are not allowed to play on girls' teams. Several boys filed suit seeking positions on the girls' volleyball team because there was not a boys' team. At the outset, the Ninth Circuit Court of Appeals announced that the prohibition could be sustained only if it was substantially related to the achievement of an important governmental objective. In applying this standard, the court said it was willing to consider actual differences between the sexes.[176] However, justifications that reflected "archaic and overbroad" generalizations were not acceptable.[177]

The AIA characterized the exclusion of males from female teams as a means to promote equality of athletic opportunity between the sexes. The AIA, through the rule, argued that it was seeking to "compensate for the girls' historical lack of opportunity in interscholastic athletics."[178] Allowing boys to participate on girls' teams would diminish athletic opportunities for girls because, the AIA alleged, boys were physiologically superior. The court ruled that the promotion of equal opportunity in athletics for women was a legitimate state objective, agreeing that males would probably displace females if they were allowed to play volleyball. Hence, the prohibition was upheld as a legitimate method of enhancing equal athletic opportunity for women.

---

[172] *Id.* at 514; *see* Sherbert v. Verner, 374 U.S. 398 (1963).
[173] Keller, *supra* note 170 at 514.
[174] Hunt v. Scotia-Glenville Cent. School Dist., 460 N.Y.S.2d (N.Y. App. Div. 1983).
[175] Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982).
[176] *Id.* at 1129; *see* Michael M. v. County Super. Ct., 450 U.S. 464, 468 (1981).
[177] *See* Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982).
[178] Clark, *supra* note 175 at 1127.

An eighth-grade female in Missouri sought a court injunction that would allow her to compete for a place on her school's eighth-grade football team.[179] The student alleged that not being allowed to play football was a sex-based determination that violated her right to equal protection of the laws under the fourteenth amendment. The school provided no football team for girls and no volleyball team for boys.

The school district, in support of the policy, cited the risk to females who played contact sports with boys, administrative difficulties, and possible diminished athletic opportunities for girls should boys be allowed to play volleyball. The court declared that it would consider differences between sexes so long as they were "free of fixed notions concerning the roles and abilities of males and females."[180] The court rejected the notion that equal opportunity mandated the exclusion of each sex from participation in the other's sport: "[I]f the idea is to maximize educational athletic opportunities for all students, regardless of gender, it makes no sense, absent some substantial reason, to deny all persons of one sex the opportunity to test their skills at a particular sport."[181] The court found that safety considerations did not provide a substantial reason to prohibit females from playing football. Although no legal entitlement to a position on the football team existed, the court ruled that the school district could not prevent students, male or female, from trying out for the team.

An unusual case concerning attorney fees was decided in Michigan.[182] A girl was cut from the coed high school golf team in 1979. She filed suit, alleging that she had been discriminated against on the basis of sex. She later amended her complaint, charging that many of the school's athletic programs discriminated against females. The amended suit sought no damages, only a declaratory judgment. The school, after finding sufficient student interest, then formed a girls' golf team. The plaintiff dropped her suit, later seeking attorney fees as the "prevailing party." The court held that the fees could not be awarded unless it was demonstrated that substantial results were achieved by the lawsuit. Since there was neither a settlement nor a consent judgment, the plaintiff could not be considered the "prevailing party" and could not recover fees.

---

[179] Force v. Pierce City R-VI School Dist., 570 F. Supp. 1020 (W.D. Mo. 1983).
[180] *Id.* at 1024.
[181] *Id.* at 1028.
[182] Other v. Ann Arbor School Bd., 699 F.2d 309 (6th Cir. 1983).

4.6 SUBSTANTIVE RIGHTS OF STUDENTS

4.6a Search and Seizure

School officials have traditionally been held to lesser standards in the conduct of searches and seizure. Law enforcement officials acting in an official capacity are required to demonstrate "probable cause" before obtaining a search warrant. Only a narrow range of searches can be conducted without a warrant. School officials who conduct searches, however, are held to the less demanding standard of "reasonable suspicion." This less rigorous test is used when the evidence obtained from searches in school is used only in school disciplinary action rather than in criminal prosecution.

In 1983, courts issued conflicting opinions on the degree of suspicion required in cases where schools use sniff dogs to search students and property. Currently, a difference between the Fifth Circuit and the Seventh Circuit remains unresolved. Lower federal courts have also written opinions at odds with the decisions of other courts.

The Fifth Circuit has held the use of "sniff dogs" to search out drugs on school grounds constitutional.[183] In a second opinion, however, the court mandated that some level of "individual suspicion" exist before allowing the dogs to sniff students.[184] This holding conflicted with an opinion of the Seventh Circuit which found that sniffs were not searches within the meaning of the fourth amendment.[185]

In December, 1982, the Fifth Circuit entered a clarification of its opinion.[186] The court stated that school officials were not required to establish a "reasonable certainty" that contraband was present before using the dogs. Instead, the court had remanded the case so that the reliability of the dogs could be evaluated. The court sought to ascertain whether, with a degree of "reasonable certainty," a dog's alert could be said to represent a "reasonable suspicion" that contraband was present. The Supreme Court declined to review the case[187] and the district court decision on dog reliability is still awaited.

---

[183] Horton v. Goose Creek Indep. School Dist., 667 F.2d 471 (5th Cir. 1982).

[184] Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1982); *see* YEARBOOK 1983 at 183-85.

[185] Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979); Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022; *see* YEARBOOK 1983 at 184.

[186] Horton v. Goose Creek Indep. School Dist., 693 F.2d 524 (5th Cir. 1982).

[187] Goose Creek Indep. School Dist. v. Horton, 693 F.2d 524 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3536 (1983).

A search conducted by a high school principal was upheld in Ohio.[188] School administrators had received reports of vandalism and drug use in a student area known as "the pit." Surveillance by school officials resulted in the observation of a group of students smoking a marijuana cigarette. The students were taken into the school where they were questioned and searched. One student, identified by the others as the "dealer," was requested to submit to a strip search. The student revealed the contents of his pockets, yielding no contraband. He refused, however, to allow a complete strip search. No further search was conducted and no contraband found. Based upon the testimony of the other students, the plaintiff was expelled from school and subsequently filed suit contesting the search and expulsion.

The court held that the search conducted was reasonable, especially in view of the fact that the student had consented. The opinion continued, finding that even had the student not consented the search would still have been considered valid. The court found that since the school officials had acted "with responsibility for the control and discipline of the students" and, in view of the information that had been acquired, the search did not violate the student's fourth amendment rights.[189]

The school district then filed an interesting counterclaim, seeking attorney fees. The court upheld the claim, finding that "this action was frivolous, unreasonable, and without foundation."[190] Such an award in this type of case is unprecedented. Courts have, however, awarded fees to plaintiffs in cases raising significant constitutional issues. The fee issue has been appealed to the Sixth Circuit.

A New Jersey court invalidated a pair of searches of students in 1983.[191] In the first, a case which President Reagan used in public statements to illustrate his opinion that courts too often sided with student rule breakers, a student was apprehended smoking cigarettes in a bathroom. Her purse was searched for cigarettes. The search yielded various drug paraphernalia and a small quantity of marijuana. The search was invalidated because there was no reasonable suspicion. The court aknowledged that a lesser standard than probable cause was to be applied to school officials:

> [I]f the action of the [school] authorities is necessary in aid of the basic responsibility of the institution regarding discipline and the maintenance of an "educational atmosphere," then it

---

[188] Tarter v. Raybuck, 556 F. Supp. 625 (E.D. Ohio 1983).

[189] *Id.* at 629.

[190] *Id.* at 630.

[191] *In re* T.L.O., 463 A.2d 934 (N.J. 1983); State v. Engerud, 463 A.2d 934 (N.J. 1983).

> will be presumed facially reasonable despite the fact that it may infringe to some extent on the outer bounds of the fourth amendment rights of students.[192]

However, since the evidence obtained was to be used in a criminal prosecution, a higher standard of suspicion was needed. The court held that the school official did not have reasonable grounds to believe that the student was concealing evidence of criminal activity. Since the possession of cigarettes was not a violation of school policy, there was no justification for further search.

The companion case reached a similar conclusion.[193] School administrators received an anonymous tip that a student was distributing drugs to other students. Acting on the tip, school officials used a pass key to open the student's locker and conducted a search of the contents. Two packets of a white powder, later identified as speed, were discovered and seized. The student was charged with criminal possession.

Following roughly the same logic as in the first case, the court walked the tightrope between the responsibility of school officials to maintain a suitable educational atmosphere and the constitutional rights of students. Acknowledging that the student had an expectation of privacy in the locker, the court held that there was not sufficient evidence to suggest that the locker contained contraband. Had the school employed a policy of regular locker inspection, the student's expectation of privacy "would not have been as significant."

A case in California focused on the distinction between searches conducted by law enforcement officials and those performed by school personnel.[194] A police officer moonlighting as a security guard for a public school apprehended a juvenile who was trespassing. In accordance with standard police procedure, the guard conducted a pat-down search of the juvenile. The search yielded a mace, which had been concealed by the juvenile. The juvenile was made a ward of the court for having possession of the club. The youth contested the search and sought to have the evidence suppressed.

The state conceded that the search would have been illegal under normal circumstances. However, when examined under the less exacting standards applied to school personnel, the search and the evidence produced were valid. The court decided that although the guard was a police officer, that night neither was he equipped as a law enforcement officer nor was his intent to "enforce the law."[195] The court found that the search was "cursory" and "conducted as a routine part of the procedure in furtherance of a nonpenal purpose."[196] From this opinion, it can be suggested that part of the distinction between police and school searches rests upon the purpose of the search. If the search has a nonpenal purpose it can be validly conducted upon school grounds, even upon nonstudents. The evidence found during such searches is not considered tainted, however, and might be used in criminal proceedings. Courts, then, may have to consider carefully the motives of those conducting searches, a sometimes difficult question.

---

[192] *Id.* at 940.

[193] *Id.* at 943; *see* People v. Overton, 360 N.E.2d 596 (N.Y. 1967).

[194] *In re* Reynaldo R., 196 Cal. Rptr. 238 (Cal. Ct. App. 1983).

[195] *Id.* at 239-40.

A teacher's aide patrolling a Florida school parking lot looked into a student's car and observed paraphernalia commonly involved in drug use. Further search revealed a quantity of marijuana cigarettes. A state court, reviewing the student's request to quash the evidence that was used in criminal prosecution, found that the student's expectation of privacy was lowered by other drug use at the school.[197] The doctrine of in loco parentis gave school officials more latitude in their actions. Additionally, the court held that school administrators have wider power in order to provide for a safe environment conducive to educational purposes:

> [T]he realities of the school setting require that teachers and other school personnel have the power to make an immediate, limited search, for contraband, weapons, or other prohibited objects or substances, when a reasonable subjective suspicion supported by objective articulable facts would lead a reasonably prudent person to suspect that these items are present, or that school regulations are being violated.[198]

The court justified the search by citing the responsibility of school personnel to patrol school property. The need to supervise students on school property essentially obviated the requirement that mere looking in cars be preceded by "reasonable suspicion," the court said. Thus, the aide's look into the car was a "legally permissible pre-intrusive open view." The discovery of the paraphernalia was sufficient to justify a more extensive search of the car.

A Kentucky court heard a student's suit for damages arising out of a strip search conducted in a high school.[199] The student was known to have distributed a variety of illegal drugs to his classmates. Additionally, the student admitted that he used marijuana frequently. He was then requested to submit to a search. At no time did the student resist. No contraband was discovered and no criminal charges were filed.

---

[196] *Id.* at 241.

[197] Florida v. D.T.W., 425 So. 2d 1383 (Fla. Dist. Ct. App. 1983).

[198] *Id.* at 1386; *see also* Washington v. McKinnon, 558 P.2d 781, 784 (Wash. 1977); *In re* L.L., 280 N.W.2d 343 (Wis. 1979).

[199] Rone v. Daviess Cty. Bd. of Educ., 655 S.W.2d 31 (Ky. Ct. App. 1983).

The court announced that strip searches could not be justified as a normal procedure. Strip searches could be conducted only after school administrators had a "substantial reason" to believe that the student was in possession of contraband. However, the court affirmed the special powers school officials possess to "safeguard the welfare" of students in the school.[200] In this context the search was held to be reasonable under the proscriptions of the fourth amendment.

A Texas court reviewed an order finding a juvenile to be delinquent.[201] The juvenile, a student at a San Antonio public high school, was detained during his school's "test day." In accordance with school policy for that day, students were to be in a classroom taking a test or in the auditorium or, if exempt from testing, at home. The student was found roaming the halls and was sent to the principal's office. The principal testified that while in the office the student "paced about the office and was belligerent, and had red eyes and was very erractic."[202] the principal ordered the student to empty his pockets, threatening to call the police if the student failed to comply. The student produced a marijuana cigarette from his pocket.

Relying heavily on prior cases, the court ruled that the principal's actions were covered by the doctrine of in loco parentis.[203] The court quoted with approval a 1970 Texas case that stated, "it does not seem to be outside the purposes of discipline in a system of education for the principal of a public school to discover and bring under control drugs considered dangerous under law and possession of which is made an offense by law."[204]

2.6b First Amendment Religious Rights

A number of important first amendment religion cases were decided in 1983. Attempts by legislatures and school boards to provide for "moments of silence" or other forms of religious observances short of formal prayers continued to result in litigation. Courts consistently held these schemes unconstitutional because of their nonsecular purposes. For the most part, moments of silence are seen as a proscribed official establishment of religion. In addition, the use of public school property by religious groups, textbook-sharing agreements, public school Bible study classes, and tuition tax credits for education were reviewed by courts in 1983.

---

[200] *Id.* at 33-34.

[201] R.C.M. v. Texas, 660 S.W.2d 552 (Tex. Ct. App. 1983).

[202] *Id.* at 553.

[203] *See* Mercer v. Texas, 450 S.W.2d 715 (Tex. Civ. App. 1970); Ranniger v. Texas, 460 S.W.2d 181 (Tex. Civ. App. 1970).

[204] Mercer v. Texas, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970).

In order to determine whether a public school policy or practice violates the provisions of the establishment clause, courts use the tripartite test delineated in *Lemon v. Kurtzman.*[205] Approval of the policy requires courts to consider three questions: Does the policy have a secular purpose? Is the primary effect of the policy or practice one which neither advances nor inhibits religion? Does the policy engender an excessive entanglement with religion? Should the policy or practice fail to meet any of these criteria, it violates the first amendment.

The United States Supreme Court held in *Engle v. Vitale* that a school religious practice that is voluntary still violates the establishment clause.[206] This prohibition was cited, along with the *Lemon* test, in a 1983 Eleventh Circuit Court of Appeals decision that reversed a district court decision and struck down Alabama's moment of silence.[207] This case followed a labyrinthine path to adjudication. The district court had flouted the principle of stare decisis and many precedents on the question and upheld Alabama statutes that provided for a "period of silence" at the start of the school day and prescribed a prayer for those teachers who desired to lead their classes in devotions during that time.[208]

The plaintiffs had appealed to Justice Powell for a stay of the district court's decision. In granting the stay, Powell chastised the district court for its unique interpretation of the first amendment.[209] The case then came before the court of appeals where the statutes in question were struck down. At the outset, the court of appeals found that the absence of a requirement mandating that a prayer be recited in the schools did not exempt the practice from scrutiny under the *Lemon* test.[210] The fact that it was teachers who were leading the prayers provided the basis for classifying the practice under the mantle of state action. The court found no secular purpose in the practice, despite the voluntary nature of the statutes. The court held that "prayer is perhaps the quintessential religious practice."[211] Thus, it concluded that the existence of prayer precluded a secular purpose or an effect that did not advance religion. Finally, it was decided that because the prayers took place on public property and were led by government employees, the practice constituted an excessive entanglement with religion.

---

[205] 403 U.S. 602 (1971).

[206] 370 U.S. 421 (1962).

[207] Jaffree v. Wallace, 705 F.2d 1528 (11th Cir. 1983); *see* YEARBOOK 1983 at 188.

[208] Jaffree v. Board of School Comm'rs of Mobile Cty., 554 F. Supp. 1104 (S.D. Ala. 1983).

[209] Jaffree v. Board of School Comm'rs of Mobile Cty., 103 S. Ct. 842, 843 (1983).

[210] Jaffree v. Wallace, *supra* note 207 at 1533.

[211] *Id.* at 1534.

A similar policy was challenged in New Mexico.[212] The New Mexico legislature had authorized schools to provide for a "moment of contemplation" each day. In a fashion similar to the Alabama statute, the New Mexico law allowed prayer during this moment of silence.[213] The district court examined the legislative history of the act and determined that the purpose of the statute was "to establish a devotional exercise in the classrooms of New Mexico public schools."[214] Having determined the nonsecular purpose of the statute, the court considered whether the law advanced the cause of religion. It concluded that the public's perception of the practice caused an advancement of religion. The court also cited the hazards "inherent in the sovereign placing its imprimatur on a religious exercise . . . where children are involved."[215]

A district court in Houston struck down school prayer of a somewhat different form.[216] Over the entrance to the Aldine Senior High gymnasium appeared the following inscription: "Dear God, please bless our school and all it stands for. Help keep us free from sin, honest and true, courage and faith to make our school the victor. In Jesus' name we pray, Amen." This prayer was also recited at school assemblies, athletic events, and other extracurricular proceedings. The court concluded that this activity constituted prayer that was organized and practiced in such a way to offend the United States Constitution.

Responding to the school district's claim that the prayer was a means to a secular goal, the court concluded, "A school district or other governmental body cannot seek to advance nonreligious goals and values, no matter how laudatory, through religious means."[217] The court then refuted the oft-repeated notion that the voluntary nature of the practice rendered it constitutionally inoffensive. Citing a line of cases, the court stated that "voluntariness is not relevant to a first amendment inquiry."[218] The court also found cause for invalidation of the practice in the third part of the *Lemon* test. Because the activity was undertaken on school grounds and at school events, it excessively entangled the school with religion.

In New Jersey, a United States district judge struck down New Jersey's "minute of silence" law.[219] The minute of silence each morning in the state's schools was to provide for contemplation or introspection before the start of school. The court held that the statute was, in reality, a thinly veiled attempt to "sneak prayer into the public schools."[220] The court cited the legislative history of the proposal in finding that it had no secular purpose as required by the *Lemon* test.

---

[212] Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 1013 (D.N.M. 1983).

[213] N.M. STAT. ANN. § 22-5-4.1 (1982); ALA. CODE § 16-1-20.1, § 16-1-20.2 (1982).

[214] Duffy, *supra* note 212 at 1015.

[215] *Id.* at 1016.

[216] Doe v. Aldine Indep. School Dist., 563 F. Supp. 883 (S.D. Tex. 1982).

[217] *Id.* at 886.

[218] *Id.* at 887.

[219] May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983).

The Court of Appeals of California voided plans for prayers at public school graduation ceremonies in Alameda County.[221] The court held that the prayers constituted illegal governmental establishment of religion. The court also dismissed the claim that the students had a constitutional right to hear a prayer, especially at an event which was noninstructional.

During 1983 courts also considered the relationship between church and state in cases involving the use of public school property by religious groups, textbook-sharing agreements, public school Bible classes, and tuition tax credits. In a case attracting wide notice, the United States Supreme Court upheld a Minnesota plan that gave tax credits to parents to defray the cost of their children's education.[222] The statute allowed state taxpayers to deduct expenses incurred in providing "tuition, textbooks, and transportation" for children attending elementary or secondary schools.[223] The Court first appeared to deemphasize the *Lemon* test by announcing that "While this principle [the *Lemon* test] is well settled, our cases have also emphasized that it provides no more than a helpful signpost in dealing with establishment clause challenges."[224] Nonetheless, the Court then proceeded to decide the case within the *Lemon* framework.

The tax credit program was judged to have a secular purpose: helping parents pay for their children's education at any institution. Though most of the benefits from the scheme would accrue to families with children enrolled in private schools, the court held that such an effect was incidental and not the primary goal of the statute: "Public assistance made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefitted might not offend the Establishment Clause."[225] Having made this claim the Court then proceeded to affirm the tax credits in the face of challenges stemming from the two remaining criteria of the *Lemon* test.

In Pennsylvania, a federal district court faced a claim that the Williamsport School District had discriminated against a group of students by not allowing them to form a club devoted to prayer and the study of the Bible.[226] The Williamsport High School organized a "student activity period" to encourage students to participate in extracurricular activities. Several student sought sanction for a group that would prayer and read the Bible at meetings. Their request was denied by school officials, who cited the establishment clause as justification. The students filed suit alleging that their right of free exercise of religion had been denied.

---

[220] *Id.* at 1572.

[221] Bennet v. Livermore, No. H-91312-6, Educ. Dailey, June 15, 1983 (Cal. Ct. App. 1983).

[222] Mueller v. Allen, 103 S. Ct. 3062 (1983).

[223] MINN. STAT. ANN. § 290.09(22) (1983).

[224] Mueller, *supra* note 222 at 3066.

[225] *Id.* at 3068.

The court employed a two-tier test to determine whether the school district had indeed violated the students' rights. The first segment of the test required the students to demonstrate that the school district had either "conditioned receipt of an important benefit upon conduct proscribed by a religious faith or denied such a benefit because of conduct mandated by religious belief."[227] Once the coercive nature of the action had been established, the school district would be required to prove that the action stemmed from a compelling interest and that less restrictive measures were not available. Applying this test, the court found that the students' free exercise rights had not been unjustly affected. It was determined that the students had not suffered the loss of a benefit when their club was denied permission to meet on school grounds. The court ruled that the students were still able to pray and worship without restriction at other times and in other places.[228]

The court then explored the free speech issues raised by the plaintiffs, looking at the law surrounding speech in public forums.[229] The court decided that the school district had established a limited public forum by creating the activities period. The school district was thereby obligated to avoid restrictions on speech in that forum unless the restrictions were vital to ensure the functional integrity of the forum. Thus, "The scope of permissible limitations appears to be defined by the government's purpose in creating the forum."[230] The court decided that the school's actions constituted impermissible content-based restrictions, since no other group had ever been denied permission to meet during the activities period. The school's refusal to allow the group to meet was judged to have no relation to maintaining the integrity of the public forum.

Finally, the court considered the state's claim that allowing the Bible study group to meet on school grounds, under the supervision of school personnel, would violate the provisions of the establishment clause. This argument was dismissed by the court by utilizing the *Lemon* test. The court decided that the policy that gave the religious group the right to meet was secular in nature. Although the policy contributed to the advancement of religion, that result was merely incidental. Hence, the policy was able to pass constitutional muster.[231]

---

[226] Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983).

[227] *Id.* at 702.

[228] *Id.* at 703.

[229] *See* Widmar v. Vincent, 454 U.S. 270 (1981); City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Rels. Comm'n, 429 U.S. 167 (1976).

[230] Bender, *supra* note 226 at 705.

In a similar case, a federal district court in Kansas reviewed a claim filed by the Country Hills Christian Church.[232] The church contested the refusal of the Johnson County School District to rent it space in which to hold religious ceremonies. The school district had adopted policies that granted other nonschool groups access to school facilities. The court ruled that such an access policy created a public forum: "If it is opened to the school district community for meetings and discussions during non-school hours, then it becomes a public forum for the community."[233]

The court then considered whether a policy that allowed access to religious groups would violate the establishment clause. Following the structure of inquiry elaborated in *Lemon*, the court concluded that the policy was constitutional. It ruled that the primary effect of the policy was secular; hence, any advancement of religion resulting from the policy was incidental. Further, in determining whether the open access policy entangled the school district with religion, the court held that an open access policy in fact deterred excessive entanglement.[234]

Another public forum case was litigated before a state court of appeals in Florida.[235] The Sarasota County School District allowed two churches to hold services in school facilities. Suit was brought by a parents' group alleging that this action violated the establishment clause. As in the previous cases, the court found that religious assemblages could be tolerated in school facilities if the gathering was the result of an open access policy.

The relationship between religion and school curriculum also has been explored in several recent cases. The Sixth Circuit Court of Appeals upheld the district court's injunction against an arrangement between public and private schools involving "shared time" and "community education" programs in Grand Rapids, Michigan.[236] The programs offered classes in schoolrooms leased by the school district from nonpublic schools. Signs were posted in the leased rooms designating them "public school" rooms. Almost invariably the students attending classes in the leased rooms were from the adjoining nonpublic schools. The average nonpublic school student, however, spent less than ten percent of his or her time attending classes offered through the shared time program.

---

[231] *Id.* at 710.

[232] Country Hills Christian Church v. Unified School Dist. No. 512, 560 F. Supp. 1207 (D. Kan. 1983).

[233] *Id.* at 1216.

[234] *Id.* at 1219.

[235] O'Hara v. School Bd. of Sarasota Cty., 432 So. 2d 1356 (Fla. Dist. Ct. App. 1983).

[236] Americans United for Separation of Church and State v. School, 546 F. Supp. 1971 (W.D. Mich. 1982); *see* YEARBOOK 1983 at 188.

Applying the *Lemon* test, the appeals court determined that the purpose of the program was indeed secular. However, despite the secular purpose of the program, the beneficiaries were a narrow range of religiously segregated students. Since most of the attendees of the program were students of parochial schools and since many of the instructors in the program retained ties to those same parochial schools, the court found it impossible to assert that the program did not serve to advance religion. Examining the third portion of the *Lemon* test, the court found the program to cause excessive administrative entanglement between the school district and religion. The court was careful to distinguish its opinion in this case from the recent United States Supreme Court decision concerning state aid to nonpublic schools.[237] The distinction rested upon the fact that the grand Rapids program directly aided nonpublic schools whose primary purpose involved religious instruction.[238]

A South Dakota textbook loan statute was scrutinized by the Eighth Circuit Court of Appeals.[239] A suit was brought challenging the state's policy of providing textbooks for nonpublic as well as public school students.[240] Only books that were utilized by public schools could be made available to private school pupils. It was charged that the loan statute was unconstitutional, both facially and in its application. The suit alleged that the statute had the primary effect of advancing religion by providing public aid to church-related, private schools. In addition, it was charged that the loan policy engendered an excessive entanglement between church and state.

The court concluded that the textbook loan statute did not violate the proscriptions of the first amendment. Drawing heavily from decisions of the United States Supreme Court, the court decided that since the textbooks loaned to private schools were also designated for use in public schools the statute did not necessarily serve a religious purpose.[241]

---

[237] *See* Mueller v. Allen, 103 S. Ct. 3062 (1983).

[238] *See* Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975).

[239] Elbe v. Yankton Indep. School Dist. No. 1, 714 F.2d 848 (8th Cir. 1983).

[240] S.D. CODIFIED LAWS ANN. § 13-34-162 (1982).

[241] Elbe, *supra* note 239 at 851.

However, the appeals court remanded the case to the district court to ascertain whether the manner in which the loan statute was applied violated the Constitution. The court noted that the provision of ostensibly neutral instructional materials to predominantly religious schools might still offend the first amendment.

Parents of a high school student in Pennsylvania filed a civil rights action against a school guidance counselor.[242] The parents charged the counselor with violating their child's right to free exercise of religion and intruding upon the privacy of a family relationship. The counselor, in sessions with the student, had inquired about the student's family relationships, religious beliefs, and sexual orientation. The counselor, after several of these sessions, recommended that the student undergo psychiatric evaluation.

The court held that, "while there is a constitutional right to freedom of religion, it is not absolute and may be circumscribed by a compelling state interest."[243] In this case the court ruled that the first amendment does not guarantee that nothing about religion will be taught or discussed in a public school. Moreover, the discussion of sensitive topics, even between a teacher and a student, does not intrude upon constitutional rights of privacy or belief.

A federal district court in Virginia decided a cases challenging the constitutionality of a Bible class taught in public elementary schools.[244] A course in the study of the Bible was offered as an elective to fourth and fifth graders in the public schools. These classes were funded, staffed, and controlled by a volunteer group of Protestant ministers from the area. No control over the curriculum of the program was exercised by the school district.

The court held that the teaching of a Bible class was not unconstitutional per se: "The first amendment was never intended to insulate our public institutions from any mention of God, the Bible, or religion."[245] However, the court cited the religious affiliations of the sponsors of the program in finding the program unconstitutional. The pervasive influence of organized religion in the teaching of the course caused the course to become a forbidden, governmental-supported exercise of religion.[246] Several guidelines were set forth in the opinion to facilitate the teaching of the Bible in an objective, secular manner.[247] At the heart of these recommendations was the need for such a class to be under the supervision of school authorities. The court held that the curriculum should be controlled by public school officials and the instructors ought to be certified by the state.

---

[242] Roman v. Appleby, 558 F. Supp. 449 (E.D. Pa. 1983).
[243] *Id.* at 456.
[244] Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983).
[245] *Id.* at 1425.
[246] *Id.* at 1430.
[247] *Id.* at 1431; *see also* Vaughn v. Reed, 313 F. Supp. 431 (W.D. Va. 1970).

The Eleventh Circuit Court of Appeals upheld a district court's award of attorney fees.[248] A suit in Alabama had successfully challenged a practice of conducting morning devotionals and a Bible class in a public high school.[249] The court held that even though the case had not "revolutionized First Amendment Law," there was still sufficient justification to award attorney fees to the prevailing party.

Finally, the Louisiana Supreme Court pondered a question certified to it by the Fifth Circuit Court of Appeals.[250] The court of appeals asked the State Supreme Court to determine whether the Board of Elementary and Secondary Education, established by Louisiana's Balanced Treatment for Creation-Science and Evolution Science Act, ensured the educational policy prerogatives of the state legislature.[251] The court held that the board's existence did not foreclose the exercise of control over the state education system by the legislature, but did not consider other aspects of the act.

4.6c First Amendment Freedom of Expression

The first amendment rights of students were explored in a variety of manners by courts in 1983. Suits contesting textbook selection statutes, the placement of undercover agents in classrooms, and the firing of a high school journalism teacher, allegedly involving his supervision of the school newspaper, all raised important constitutional questions.

Parents, teachers, and students brought action challenging the constitutionality of Oregon's textbook selection statute. The statute provides that "[n]o textbook shall be used in the schools which speaks slightingly of the founders of the republic or of those who preserved the union or which belittles or undervalues their work."[252] The students claimed that the statute restricted their first amendment right of free access to information.

The students' claim was held to be nonjustifiable by the federal district court because the students lacked standing to sue. On appeal, the Ninth Circuit Court of Appeals decided that the students did possess standing since their alleged injury "can be traced to the challenged action."[253] In this case, the restraint of the students' rights was held to stem from the textbook statute. The court of appeals remanded the case to the district court for a decision on the merits.

---

[248] Hall v. Board of School Comm'rs of Conecuh Cty., 707 F.2d 464 (11th Cir. 1983); *see* YEARBOOK 1982 at 155-56.

[249] Hall v. Board of School Comm'rs, 656 F.2d 999 (5th Cir. 1981).

[250] Aguillard v. Treen, 440 So. 2d 704 (La. 1983).

[251] LA. REV. STAT. ANN. §§ 17.286.1-17.286.7 (1982).

[252] OR. REV. STAT. § 337.260 (1982).

An undercover policewoman was placed in two high school classes in Warren, Michigan. The officer was to assist in reducing drug trafficking in the high school. The policewoman was placed in classes known to be run "liberally" on the open classroom model. Teachers and students filed a suit alleging that the presence of the agent inhibited free discussion in the two classes.[254] Once it was known that police operations were being conducted in the school, it was claimed "class discussions became stilled, and certain topics were avoided, and students refused to freely express their opinions."[255]

The court responded to the students' claim that their first amendment rights were chilled by the presence of the agent by holding that the "mere presence of an intelligence data-gathering activity in the classroom does not create a justifiable controversy."[256] Hence, a first amendment claim could not be established.

In California, a high school journalism teacher was dismissed from employment. He alleged that his firing resulted from a series of disputes over the content of the student newspaper in the school. He also claimed that school officials had violated his constitutional rights and also those protecting the integrity of the student newspaper.[257] After a series of controversial articles, the principal of the school insisted that issues of the paper be submitted to his office to ensure accuracy and fairness. The principal often voiced disapproval but never denied publication or censored the submitted articles. The court held that though students maintain their constitutional rights in school, those rights are "not coextensive with those of adults and may be modified or curtailed by school policies that are reasonably designed to adjust those rights to the needs of the school environment."[258]

School officials are thus entitled to prepublication review of student newspapers as long as the review furthers a "substantial educational interest." The court announced that the judiciary could intervene only where the resolution of conflicts in school administration clearly involved constitutional values.[259] It is important to note that the paper in question was fully supported by the school.

---

[253] Johnson v. Stuart, 702 F.2d 1983 (9th Cir. 1983).

[254] Gordon v. Warren Consol. Bd. of Educ., 706 F.2d 778 (6th Cir. 1983).

[255] *Id.* at 779.

[256] *Id.* at 781.

[257] Nicholson v. Board of Educ. of Torrance Unified School Dist., 682 F.2d 858 (9th Cir. 1982).

[258] *Id.* at 863; *see* Williams v. Spencer, 622 F.2d 1200, 1205 (4th Cir. 1980).

[259] *See* Epperson v. Arkansas, 393 U.S. 97 (1968).

4.7 SANCTIONS FOR STUDENT MISCONDUCT

4.7a Suspensions and Expulsions

Suspensions from school of ten days or less must be preceded by a brief hearing in which the student has the opportunity to tell his or her perspective on the event causing the suspension.[260] Expulsion from school is a penalty so severe that courts have required substantial due process before a student is removed.[261] As in previous years, 1983 cases in this area raise questions about whether students received adequate due process before suspension or expulsion. Courts continued to grant wide latitude to school districts in the establishment of rules to maintain order in schools and refused to intervene in several cases in which districts did not exactly follow their own procedural requirements.

The Supreme Court of Vermont considered a case in which a student was expelled and received formal written notice of the charges against him two days after the expulsion hearing.[262] The case record showed that the student did not consent the fact that he had sold marijuana in the school and that the date for the school board expulsion hearing had been agreed to by the plaintiff's father. While agreeing that the school district had now followed Vermont law regarding the formal hearing notice, the divided court refused to overturn the expulsion. To do so, the court majority argued, would "exalt form over substance."[263] Because there was substantial compliance with administrative regulations and the offense threatened the welfare of the school, the expulsion was sustained. Dissents entered by two of the five justices hearing the case argued that the requirement of written notice should not be waived.

Parents of an Illinois student expelled for possession of pills containing caffeine and ephedrine filed suit arguing that the school rule against "unauthorized drugs" was unconstitutionally vague and that the penalty was unreasonable.[264] A lower court had reversed the school board's expulsion order on the grounds that the penalty was too severe. This decision was overturned by the Illinois appeals court. While the pills carried by the student did not contain controlled substances, the appeals court nevertheless concluded that the expulsion was reasonable because of the negative effect that the distribution of any form of pills would have in the restricted environment of the school. The appeals court refused to consider the vagueness of the school rule because the issue had not been properly raised in the trial court.

---

[260] Goss v. Lopez, 419 U.S. 565 (1975).

[261] Wood v. Strickland, 420 U.S. 308 (1975).

[262] Rutz v. Essex Junction Prudential Comm., 457 A.2d 1368 (Vt. 1983).

[263] *Id.* at 1372.

[264] Wilson v. Collinsville Commun. Unit School Dist., 451 N.E.2d 939 (Ill. App. Ct. 1983).

In a rare decision overturning a student's expulsion, a Florida appeals court concluded that a student could not be expelled for carrying a boxed, commemorative knife to school.[265] The district had a policy requiring automatic expulsion for possessing a weapon on school grounds. The knife had been purchased by the student's father as a Christmas present for her boyfriend and was carried to school by accident when the student was showing a friend the knife at the school bus stop and the bus arrived before the student could return the knife to her home. The next step in this unusual case occurred when school officials uncovered the knife after searching the student's purse while investigating an incident involving a different student who was smoking in a lavatory. In overturning the expulsion, the Florida court concluded that the whittling knife sealed in a gift box did not meet the school's definition of knives as weapons.

School systems sometimes reduce grades in conjunction with suspension from school, and the cases that result raise questions about the student's property rights. Two high school seniors in Texas filed suit after they were suspended for three days for drinking on a school trip and had their grades reduced as well.[266] A lower court found that the grade reduction deprived the students of property rights and violated their right to substantive due process. These interesting questions were not fully addressed by the appeals court, however. Instead, the court focused on the question of whether the students had received adequate notice of the penalty, since it was not contained in the handbook of rules for the school. The court concluded that the rule had been sufficiently explained at school assemblies. The court found the substantive due process issue moot because the students had been admitted to college by the time the case was heard. Therefore, the court concluded, there could have been no adverse effect on the students' property rights.

In another grade reduction case, a student was given an "F" in music for missing two required concert performances. The student, who was vacationing with his family in Hawaii at the time of the concerts, claimed that the concerts violated his first amendment rights because they were offered in churches and contained selections of music with religious themes. A Missouri appeals court rejected these claims, noting that students claiming a religious exemption in advance had been excused from the concerts and that the music was not part of any religious service.[267] No clergy were present and no prayers were offered. The court also rejected attempts to inject substantive due process claims into the appeal, noting that they had not been raised in the trial court.

---

[265] C.J. v. School Bd. of Broward Cty., 438 So. 2d 87 (Fla. Dist. Ct. App. 1983).

[266] New Braunfels Indep. School Dist. v. Armke, 658 S.W.2d 330 (Tex. Ct. App. 1983).

In two other suspension cases, courts confronted the markedly different issues of a no smoking rule and statutory rape. In the first, a Georgia appeals court dismissed an appeal of a suspension for smoking, holding that the student failed to exhaust state administrative appeals and that the case was moot because the student had left the state.[268] In the second, a long-term suspension of a student for assaulting a woman not connected in any way with the school, during a school vacation, was overturned.[269] The New York Commissioner of Education found that the school district had exceeded its authority in making the suspension and the court agreed.

4.8 TESTING AND PLACEMENT

The questions of whether handicapped students could be required to pass a minimum competency test before receiving a high school diploma and, if so, how much notice was required before such a system went into effect, were considered by the Seventh Circuit Court of Appeals. The case considered a policy established by the Peoria school district which required all students to pass examinations in reading, language arts, and mathematics before receiving a high school diploma. The plaintiffs in the case had received about one and one-half years' notice that the test would be administered. When they failed to pass the test, an appeal to the Illinois Superintendent of Public Instruction led to an order that they receive diplomas. This order was appealed by the school district to a federal district court, which reversed the state's decision.[270]

The plaintiffs appeals, arguing that the test requirement violated terms of the Education for All Handicapped Children Act (EHCA), section 504 of the Rehabilitation Act of 1973, and the requirements of the fourteenth amendment of the United States Constitution. The appeals court addressed each of these issues in order, concluding first that EHCA mandated only that students have access to specialized and individualized educational services. Failure to pass a competency test was therefore not a denial of the EHCA-required "free appropriate public education."[271] Likewise the judges concluded that section 504 was an access requirement, not one that required an institution to lower or substantially modify its standards to accommodate a handicapped person. The court held out the possibility that a student's handicap might cause a modification in the way the test was administered.

---

[267] R.J.J. v. Shineman, 658 S.W.2d 910 (Mo. Ct. App. 1983).

[268] Benton v. Gwinnett Cty. Bd. of Educ., 309 S.E.2d 680 (Ga. Ct. App. 1983).

[269] Board of Educ. of Millbrook Cent. School Dist. v. Ambach, 465 N.Y.S.2d 77 (N.Y. App. Div. 1983).

[270] Brookhart v. Illinois State Bd. of Educ., 534 F. Supp. 725 (S.D. Ill. 1982); *see* YEARBOOK 1983 at 201-2.

Turning to the fourteenth amendment qustion, the appeals court found that the test requirement raised significant liberty and property interests and that sufficient notice was therefore required. The court held that one and one-half years did not allow the students an opportunity to obtain exposure to much of the material covered by the test. Instead, the court concluded, the plaintiffs' programs of instruction were geared to address individual educational needs. The circuit court therefore reversed the district court and, because several years had elapsed, making it difficult for the students to return to school, the school district was ordered to award the diplomas. While refusing to define adequate notice, the Seventh Circuit Court suggested that a school district "ensure that handicapped students are sufficiently exposed to most of the material that appears on the M.C.T., or, second, they can produce evidence of a reasoned and well-informed decision by the parents and teachers involved that a particular high school student will be better off concentrating on education objectives other than preparation for the M.C.T."[272]

A New York appeals court considered a similar case, addressing the question of whether three years' notice was adequate before handicapped students could be denied a diploma for failing a competency test. The local district had awarded the diplomas to two handicapped students, but this decision was overturned by the New York Commissioner of Eduction. The commissioner's action was challenged by the district but was affirmed by a lower court.[273] The school district appealed, raising a variety of objections to the state-required test. A state appeals court rejected these claims, concluding that neither EHCA nor section 504 precluded the use of such tests with handicapped students.[274] The court also rejected the fourteenth amendment claims, briefly stating that three years was adequate notice and that the state had a rational basis for the test requirement. The decision has subsequently been appealed to the New York Court of Appeals.

---

[271] Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179, 183 (7th Cir. 1983).

[272] *Id.* at 187-88.

[273] Board of Educ. of Northport-East Northport Union Free School Dist. v. Ambach, 436 N.Y.S.2d 564 (N.Y. Sup. Ct. 1981).

[274] Board of Educ. of Northport-East Northport Union Free School Dist. v. Ambach, 458 N.Y.S.2d 680 (N.Y. App. Div. 1982).

Litigation concerning Florida's state assessment test continued in 1983. In 1981 the Fifth Circuit Court of Appeals held that the burden was on a school system to prove that the test had "curricular validity" or that it accurately reflected materials taught in the system, and that the effect of past school segregation did not influence the test scores of minority students.[275] The case was remanded to the district court for a decision on these issues. The district court, in turn, commissioned a private consulting firm to survey the teachers of the state and to examine the curriculum in each district. This lengthy study caused the district court to conclude that the state test did indeed measure what was being taught in Florida schools.[276] The court rejected arguments advanced by the plaintiffs that curricular validity could be measured only by looking at what students actually were taught, rather than what they were supposed to be taught.

Turning to the question of past discrimination, the court began by acknowledging the high failure rate of black students on the test. Plaintiffs also argued that as many as thirty percent of the teachers in Florida were overtly or covertly racist. The district court, however, concluded that there was no causal link between past school segregation and the high minority student test failure rate. The injunction against the use of the test was therefore lifted for the class of 1983.

4.9 DESEGREGATION

4.9a Systemwide Remedies

Continuing a trend seen in recent years, courts in 1983 were less likely to find fault with school district policies seeking to reduce racial segregation of students through internal plans that avoid busing. Magnet schools and voluntary transfers now represent the key tools for reducing racial imbalance. Overall, the number of cases involving desegregation also continues to decline.

Litigation concerning the segregative intent of school board policies in the San Jose, California, Unified School district continued in 1983. A federal district court had concluded in 1981 that the construction of new schools in the district, which had not reduced segregation, was not evidence of official segregative intent.[277] In arguing the case before the

---

[275] Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981); *see* YEARBOOK 1982 at 163-64.

[276] Debra P. v. Turlington, 564 F. Supp. 177 (M.D. Fla. 1983).

[277] Díaz v. San Jose Unified School Dist., 518 F. Supp. 622 (N.D. Cal. 1981); *see* YEARBOOK 1982 at 167-68.

Ninth Circuit Court of Appeals, the plaintiffs pointed to the fact that the district had steadfastly refused to use busing to reduce segregation, while busing one-third of the district's children within racially distinct attendance areas. While observing that "the issue is close," the appeals court concluded that the district court was not in error in deciding that this policy was insufficient evidence of segregative intent.[278] In a dissenting opinion, one judge found segregative intent in the board's busing policy, in its failure to create magnet schools, and in public statements issued by the board in a recent school board referendum.

An omnibus desegregation plan for the city of Chicago agreed to by the federal government and the school board was approved by a federal court.[279] Having held off a decision in the case for the first year of the voluntary plan, the court concluded that the plan was adequate. The board had avoided student busing solely for the purpose of desegregation while developing a comprehensive student assignment plan, which established magnet schools, desegregated predominatly white schools, and set desegregation standards. Some all-minority schools remained under the plan, however. The court rejected arguments that the district plan placed a disproportionate burden on minority students.

In a subsequent decision attracting wide notice, the district court held that the federal government had failed to make financial resources available to the Chicago board to implement the desegregation plan.[280] The court held that this violated the consent decree entered into by the parties in the case. The government was given a final chance to comply before the issuance of an injunction.

The Eighth Circuit Court of Appeals reviewed desegregation plans for the Little Rock, Arkansas, school district.[281] At issue was an elementary school plan that resegregated four schools. The school board argued that such an approach was necessary to prevent further white flight, while the plaintiffs contended that such an argument could not be used to justify segregation. The appeals court concluded that the creation of the all-black schools was not in and of itself a constitutional violation, so long as the district sought equal educational opportunity for all students. The court suggested that this could be accomplished by establishing a second elementary magnet school, providing integrated learning experiences, and making attempts at voluntary student exchanges with surrounding districts. A related Little Rock case is discussed in the next section.

---

[278] Diaz v. San Jose Unified School Dist., 705 F.2d 1129 (9th Cir. 1983).

[279] United States v. Board of Educ. of the City of Chicago, 554 F. Supp. 912 (N.D. Ill. 1983).

[280] United States v. Board of Educ. of the City of Chicago, 567 F. Supp. 272 (N.D. Ill. 1983).

[281] Clark v. Board of Educ. of Little Rock, 705 F.2d 205 (8th Cir. 1983).

As in the Little Rock case, a New York district court ruled that the Buffalo Board of Education need not bring three of the system's fifty-six elementary schools into compliance with the system's desegregation plan.[282] The court concluded that school pairings and cluster schools had largely addressed the system's segregation without causing white flight or involving forced busing. The imbalance at the three schools was not, in itself, a constitutional violation.

The Buffalo schools were also involved in a suit seeking additional funds to pay for their desegregation plan.[283] Under New York law, a school board has no independent taxing authority, but must seek funds from local governing bodies. A district court had ordered the city of Buffalo to provide the system with an additional $7.4 million, for a total of $157 million, with the extra funds to be used to implement desegregation plans. The Second Circuit Court of Appeals upheld the district court order, even though the system had not provided detailed program data explaining how the funds would be used.[284]

4.9b Cross-District Remedies

In contrast to most school desegregation controversies, which reflect a decline in community conflict and in resulting litigation, cross-district cases continued to grind forward with little hope of early resolution. The complex issues surrounding desegregation in St. Louis continued to be argued in 1983. So many appeals have been filed in the case that the parties were admonished by the Eighth Circuit Court of Appeals in 1981 to avoid filing "premature and piecemeal interlocutory appeals."[285] Both the details of the plan, which involves suburban school systems, and the question of who should pay for the costly remedy, are at issue in the litigation. St. Louis and twenty-three suburban districts reached agreement in 1983 on the transfer of a small percentage of their combined students, but both the federal government and two of the districts subsequently questioned plan details. In approving the agreement over these objections, however, the district court observed, "Expensive adversary trials ultimately deny justice to the countless deserving people. This litigation has already consumed eleven years, and absent a settlement promises to consume many more."[286]

---

[282] Arthur v. Nyquist, 566 F. Supp. 511 (W.D.N.Y. 1983).

[283] Arthur v. Nyquist, 547 F. Supp. 468 (W.D.N.Y. 1982); *see* YEARBOOK 1983 at 206.

[284] Arthur v. Nyquist, 712 F.2d 809 (2d Cir. 1983).

[285] Liddell v. Board of Educ., St. Louis, 693 F.2d 721, 727 (8th Cir. 1981); *see* YEARBOOK 1983 at 204-5.

[286] Liddell v. Board of Educ., St. Louis, 567 F. Supp. 1037, 1041 (E.D. Mo. 1983).

The settlement approved by the court included the voluntary transfers, a staff hiring program, magnet schools, cooperative pairings, various grievance and enforcement provisions, and an award of attorney's fees. As to the costs, the court concluded that the city would be able to secure the $38,000,000 necessary for its share of the plan in 1983-84 without a court-ordered local tax increase. The state of Missouri was ordered to pay transportation and other costs. Following the district court decision, the state of Missouri and St. Louis County filed an application for a stay and the city of St. Louis filed an objection to the financing details. Concluding that it would be "improvident" to grant a stay in a plan that already was being implemented, the Eighth Circuit Court of Appeals refused to grant the stay.[287] As to the financing, the district court was prevented from ordering any future tax increase until the issue had been considered by the appeals court.

Litigation concerning the issues that might be argued in Cincinnati's school desegregation dispute were discussed in 1983, but a general resolution of the controversy seems years away. The district court ruled in 1982 that collateral estoppel could be invoked to prevent relitigation of whether the school board's practices from 1954 to 1965 had decided the issue.[289] The district court also concluded that nothing in two 1979 United States Supreme Court decisions[290] permitted a relitigation of pre-1965 issues. The Sixth Circuit Court of Appeals, however, reversed the district court's ruling[291] and the plaintiffs in the case sought to file an amended trial complaint.

Following remand, the district court again considered the matters that could be litigated.[292] The court concluded in its 1983 decision that plaintiffs were allowed to attempt to prove that state and suburban defendants acted with segregative intent to create, maintain, or perpetuate de jure segregation, either before or after 1965. The plaintiffs were also allowed to file claims regarding parties not currently involved in the litigation. The court also limited the claims that could be filed against the suburban school districts. Parties in the case were given ten days to file amended complaints.

In another much-litigated desegregaton dispute involving schools in Allegheny County, Pennsylvania, a federal court plan was considered by the Third Circuit Court of Appeals. A multidistrict plan for desegregation had been approved by the district court,[293] which found that the standards for proving segregative intent set forth in *Keyes v. School District No. 1*[294] had been met. The appeals court approved this finding of intent.[295] The merger of five school districts into one, which had been ordered by the district court, was then challenged, however, by a citizens' group that sought to deny funds to the new district. Attempts by the citizens' groups to intervene in the case were rebuffed[296] and they were enjoined from disturbing the assets of the new system.[297]

---

[287] Liddell v. Board of Educ., St. Louis, 717 F.2d 1180 (8th Cir. 1983).

[288] Bronson v. Board of Educ. of Cincinnati, 535 F. Supp. 846 (S.D. Ohio 1982); *see* YEARBOOK 1983 at 209-10.

[289] Deal v. Cincinnati Bd. of Educ., 244 F. Supp. 572 (S.D. Ohio 1965).

[290] Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

[291] Bronson v. Board of Educ. of Cincinnati, 687 F.2d 836 (6th Cir. 1982).

[292] Bronson v. Board of Educ. of Cincinnati, 573 F. Supp. 767 (S.D. Ohio 1983).

The appellants then sought to have the district court's power to continue supervision of desegregation ended, arguing that the lower court's role ended when it created the new system.[298] The Third Circuit court characterized the appeal before it as a "frontal assault" on the whole cross-district plan. In looking at whether the district court had the power to fashion such a dramatic remedy, the court looked at the nature and extent of the constitutional violation. Having found systemwide discrimination and segregative intent in the previous drawing of district boundaries, the appeals court concluded that the lower court had properly included elementary schools and cross-district assignments in its plan. The court then scolded the appellants, noting that "persistent litigation can tear apart the social fabric of the community," and urged that the parties turn away from further lawsuits.[299]

Questions concerning which parties should be defendants in a case involving segregation in the Little Rock school district and surrounding districts were answered by a federal court.[300] The court concluded that an interdistrict violation would mandate an interdistrict remedy and refused to exclude the Pulaski County District from the suit. The court did conclude, however, that the state of Arkansas was not properly a party because it had not given its consent to be sued. The state board of education was left as a defendant. The court also announced that it would consider the appointment of its own expert to help it address the case.

---

[293] Hoots v. Pennsylvania, 545 F. Supp. 1 (W.D. Pa. 1981).

[294] 413 U.S. 189 (1972).

[295] Hoots v. Pennsylvania, 672 F.2d 1107 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 55 (1982).

[296] *Id.* at 1133.

[297] Hoots v. Pennsylvania, 535 F. Supp. 1194 (W.D. Pa. 1982).

[298] Hoots v. Pennsylvania, 703 F.2d 722 (3d Cir. 1983).

[299] *Id.* at 728.

[300] Little Rock School Dist. v. Pulaski Cty. Sp. School Dist. No. 1, 560 F. Supp. 876 (E.D. Ark. 1983).

4.9c Developments Under *Swann* and *Keyes*

In a case that applied the standards contained in *Keyes*,[301] a federal court held the Benton Harbor, Michigan, area school district guilty of increasing de jure school segregation.[302] The 1978 decision found the district had assigned teachers by race, had engaged in discriminatory boundary changes, and had facilitated the transfer of white students to further segregation. The state was ordered not to pay the tuition aids for students who had left the Benton Harbor district under these circumstances. In a 1981 decision, the district court ordered desegregation that involved three other districts included in the dispute, establishing a voluntary magnet plan.[303]

The lower court decision was then reviewed by the Sixth Circuit Court of Appeals, which made its decision early in 1983.[304] The issue was complicated by the fact that the district judge hearing the case had changed before the 1981 case was decided. While the court's opinion called for a voluntary settlement, an opinion prepared by the former judge but not issued required a mandatory interdistrict remedy merging three of the districts. Plaintiffs urged the appeals court to order the merger, arguing that the new judge assigned to the case was "unfamiliar with local conditions" and overly fearful of busing. In deciding the case, the appeals court quoted long passages from the Supreme Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*[305] on the nature of the remedies to be ordered in desegregation cases. The court finally decided that the lower court plan of voluntary desegregation for the bulk of the districts was not inappropriate. The opinion ended by observing that the Michigan State Board of Education had an affirmative role to play in the magnet school compromise and that the lower court might have to order mandatory steps if the voluntary ones were not taken.

Further motions in the Benton Harbor case were subsequently heard by the district court.[306] At issue were the questions of who should pay the student transportation costs, teacher incentive salaries, and other fees and charges. These were apportioned among the defendants. A request by the state that the court's original 1981 order be vacated was rejected, with a comment by the court that neither the facts nor common sense would permit such an interpretation of the court of appeals decision. The state had sought to interpret the decision as making their participation optional.

---

[301] Keyes v. School Dist. No. 1, 413 U.S. 189 (1972).

[302] Berry v. School Dist. of City of Benton Harbor, 467 F. Supp. 630 (W.D. Mich. 1978); *see* THE YEARBOOK OF SCHOOL LAW 1980 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1980] at 222-23.

[303] Berry v. School Dist. of City of Benton Harbor, 515 F. Supp. 344 (W.D. Mich. 1981); *see* YEARBOOK 1982 at 172.

[304] Berry v. School Dist. of City of Benton Harbor, 698 F.2d 813 (6th Cir. 1983).

[305] 402 U.S. 1 (1971).

[306] Berry v. School Dist. of City of Benton Harbor, 564 F. Supp. 617 (W.D. Mich. 1983).

A 1981 desegregation plan for Nashville approved by a district court allowed neighborhood schools for grades K-4 that were racially segregated and required only fifteen percent of either race in middle and high schools.[307] On appeal, the Sixth Circuit Court of Appeals, citing *Swann*, as modified by the formula contained in *Columbus*, concluded that additional desegregation was required.[308] The district court in 1983 considered a plan developed by the school board to meet the objections of the appeals court.[309] The revised plan followed *Columbus*, allowing no more than fifteen percent deviation on either side of the percentage of minority students in the district, except in cases where long transportation was involved. Neither the plaintiffs nor the state defendants objected to the system's plan, which was formally adopted by the court. It appears, then, that the desegregation dispute in Nashville, which started in 1955, is no longer before the federal courts.

Attorney fees and other collateral issues in the Nashville case, however, remain to be fully decided. In an opinion on this subject, the district court awarded attorney fees for the period 1972 to the present, noting that the court in 1972 had entered a "final order" in the case at that time.[310] Attorney fees were awarded at current prevailing rates. Fees for the plaintiff's consultants were not allowed, nor were costs related to appeals, which were referred to the court of appeals for resolution.

4.9d Fifth Circuit Cases

While school desegregation issues are nearing resolution in many parts of the country, some of the long-standing suits in the Fifth Circuit are far from settlement. In 1981 a Louisiana district court rejected a federal government request to modify the court's original 1971 desegregation order requiring school desegregation in Rapides

---

[307] Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 511 F. Supp. 1363 (M.D. Tenn. 1981); *see* YEARBOOK 1983 at 211-12.

[308] Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 687 F.2d 814 (6th Cir. 1982).

[309] Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 572 F. Supp. 317 (M.D. Tenn. 1983).

[310] Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 558 F. Supp. 468 (M.D. Tenn. 1983).

Parish.[311] The court's plan involved pupil transfers, staffing changes, and the closing of two schools, one serving predominantly white children and one serving black students. Both parties appealed and in 1982 the Fifth Circuit Court of Appeals rejected part of the lower court decision.[312] On a motion for rehearing, the entire lower court decision was vacated and the case was remanded.[313] Following a post-remand evidentiary hearing, the district court considered alternatives proposed by the parties and readopted its original plan. The parties again appealed, focusing on the closing of the mostly white elementary school.

In this appeal the Fifth Circuit Court agreed with the lower court and affirmed the plan.[314] The school board alternative, which involved substantial minority student transportation, would have unfairly burdened the minority students, the court concluded, and other alternatives would have ended the school desegregation efforts. The court's plan, "developed with precious little of the assistance it had a right to expect from the parties," avoided these problems. One of the three judges hearing the case dissented, observing in part that "the existence of great power does not permit its fullest exercise in every case."[315] The dissent that the district court had ignored previous orders from the appeals court to reduce the sweep of the remedy.

The twenty-year-old school desegregation case involving East Baton Rouge made its way to the Fifth Circuit Court of Appeals for the fourth time in 1983. Attempts by the parties to agree on a settlement had failed and the court ordered its own plan implemented in 1981.[316] The court's plan was modified slightly in 1982.[317] The plan eliminated all one-race middle schools and all but two one-race high schools. All parties to the case except the federal government appealed portions of the lower court's order, and a new citizens' group sought to intervene in the case.

On appeal, the Fifth Circuit affirmed the lower court's decision.[318] Observing that the district had built seventy-six new schools since 1954, seventy-three of which were essentially for one race, the appeals court found this to be ample evidence of segregative intent. Under the holdings in *Keyes* and *Swann*, the appeals court found the district had an obligation to correct the racial imbalance and the system's plan to leave thirty-nine one-race schools was unacceptable. The court's plan, which left thirteen schools untouched, in turn was assailed as insufficient by the NAACP intervenors, but was sustained by the appeals court on the ground that there were sufficient reasons for excluding each of the schools. The lower court's decision not to permit additional parties to enter the case was also upheld.

---

[311] Valley v. Rapides Parish School Bd., 499 F. Supp. 490 (W.D. La. 1980); *see* YEARBOOK 1982 at 177.

[312] Valley v. Rapides Parish School Bd., 646 F.2d 925 (5th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982); *see* YEARBOOK 1982 at 177.

[313] Valley v. Rapides Parish School Bd., 653 F.2d 941 (5th Cir. 1981).

[314] Valley v. Rapides Parish School Bd., 702 F.2d 1221 (5th Cir. 1983).

[315] *Id.* at 1231.

[316] Davis v. East Baton Rouge Parish School Bd., 514 F. Supp. 869 (M.D. La. 1981); *see* YEARBOOK 1983 at 213-14.

[317] Davis v. East Baton Rouge Parish School Bd., 533 F. Supp. 1161 (M.D. La. 1982); *see* YEARBOOK 1983 at 213-14.

[318] Davis v. East Baton Rouge Parish School Bd., 721 F.2d 1425 (5th Cir. 1983).

Desegregation in Ector County, Texas, was furthered by a consent decree entered into by the parties in 1970, and the issue lay dormant until 1981 when a citizens' group filed a motion alleging that the school district had violated the terms of the 1970 agreement. The district court allowed a second parents' group to argue the opposite perspective as amicus curiae, but not as a party in the case, and hearings were held. After a number of intermediate steps, the United States and the county agreed to a new plan, which was then appealed to the Fifth Circuit by the group that had reopened the litigation.[319]

The challenged plan converted an all-minority high school into a junior high school, transferred some of the high school students into a previously all-white school, and established an elementary magnet school. The citizen's group bringing the suit sought a solution involving pairings and busing. The group formed in response to this plan sued to overturn the lower court's decision denying them permission to intervene. The appeals court answered these sundry claims by remanding the case. It concluded that the lower court had improperly denied intervention to the second group without granting a hearing and that all parties should have the right to participate in a hearing on the plan.

Smoldering desegregation issues in Denison, Texas, also re-emerged after years of apparent calm. At issue was a court-monitored elementary school assignment plan for the district's seven elementary schools and the racial composition of the administrators in those schools. The lower court's final order was based on expert testimony in a different case in another district. The testimony was applied by the district court to the Denison situation, even though Denison had a large white majority in all its schools, unlike the other district. The Fifth Circuit Appeals Court concluded that the lower court had issued the order without considering local conditions, applying an erroneous view of the law.[320] On remand, the lower court was instructed to assess the segregative intent of local school officials and to allow all parties to supply additional information. Questions on the hiring of principals were also remanded, with instructions that the district court should consider the hiring pool, not the racial composition of the district's student body.

---

[319] United States v. CRUCIAL, 722 F.2d 1182 (5th Cir. 1983).

[320] Price v. Denison Indep. School Dist., 694 F.2d 334 (5th Cir. 1983).

The largely minority student Houston school district was declared to be unitary by a federal district court judge in a 1981 memorandum opinion, which was then appealed by plaintiffs in the case. Previous school desegregation had failed, in part, when white flight eroded paring attempts. The final plan, then, left a number of one-race schools and did not require cross-district busing. The Fifth Circuit allowed the plan to stand, however, concluding that the district had made a good-faith effort and that further actions would not be effective in a district with a rapidly expanding minority population surrounded by racially stratified suburbs.[321]

In another Texas case, a decision that the Dallas system had not yet achieved unitary status was reviewed by the Fifth Circuit. The district court had rejected a major busing alternative[322] and accepted a plan allowing minority students to remain in their neighborhood schools for grades four through eight.[323] A tri-ethnic committee overseeing desegregation was disbanded by the court in 1982.[324] The case then returned to the Fifth Circuit Court of Appeals for review of these actions.[325] In addressing whether the district had become unitary, the appeals court noted that the district still opposed student reassignments, "no matter how feasible or how minimal." Thus the appeals court concluded that while the decision "cannot be indefinitely postponed," the district court was within its bounds in not reaching such a conclusion in 1981. The appeals court also accepted the plan for grades four through eight but rejected a small part of the plan calling for reassignment of students in one high school nearing an acceptable percentage of minority students. The case was returned for a decision on the question of unitary status.

Attempts to set aside a consent decree and to intervene in the case involving the desegregation of schools in Caddo Parish, Louisiana, were rebuffed by the Fifth Circuit.[326] The majority opinion held that litigation "must end at some point" and concluded that the plaintiff had ample opportunity to participate during the previous sixteen years of the litigation. A dissenting opinion, however, stressed that the interests of minority children were not adequately represented by the federal government, leaving a "disembodied class of black students . . . seeking vainly to vindicate their constitutional right to attend desegregated schools."[327] No hearing was held on the intervention motion. The minority also held that, because the government had changed its opinion three times, the appellant had no way of knowing whether or not the intervention motion was needed until the decree was announced. The majority in the case, however, held that the motion was not filed in a timely fashion.

---

[321] Ross v. Houston Indep. School Dist., 699 F.2d 218 (5th Cir. 1983).
[322] Tasby v. Estes, 520 F. Supp. 683 (N.D. Tex. 1981); *see* YEARBOOK 1982 at 176.
[323] Tasby v. Wright, 542 F. Supp. 134 (N.D. Tex. 1982); *see* YEARBOOK 1983 at 212-13.
[324] Tasby v. Wright, 559 F. Supp. 9 (N.D. Tex. 1982).
[325] Tasby v. Wright, 713 F.2d 99 (5th Cir. 1983).
[326] Jones v. Caddo Parish School Bd., 704 F.2d 206 (5th Cir. 1983).

The Georgia NAACP filed suit alleging that minority students were being assigned to classes and programs for the educable mentally retarded solely because they were black.[328] This practice was alleged to be occurring across the state of Georgia and the plaintiffs sought a summary judgment to halt the practice, alleging that it was an extension of prior discrimination against black persons. In response, defendants argued that present discriminatory intent must be proved.

Confronting these conflicting claims, the district court characterized the issue as a type of "second generation" desegregation problem on which little case law had been written. After some discussion, the court observed that *Keyes* held that the existence of subsequent segregated schooling in a system where there was intentional racial discrimination in a meaningful portion of the system created the presumption that the new segregation is the result of intentional acts. On the other hand, the district court was not prepared to take "the great leap of faith" required for the issuance of a summary judgment in the case. In calling for a full hearing in the case, the court also ruled that the plaintiffs had raised viable section 504 claims and that the prerequisites were not met for the use of offensive collateral estoppel on the issue of the alleged misclassification of black students.

In a memorandum opinion, a Texas district court approved a plan to further desegregation in Fort Worth.[329] The plan was unique, in that it was developed by an independent Citizens' Advisory Committee, working without influence of any party to the desegregation dispute. The plan reduced busing, closed schools, and spent the funds saved from these actions on improvements designed to increase educational quality. All parties to the previous litigation approved the plan.

4.9e State Courts

In 1963 the Illinois legislature adopted the Armstrong Act, which required school districts to change their internal school boundaries to further school desegregation. The state board subsequently required all districts to change their boundaries such that no school would have fifteen percent more or less minority students than the district as a whole. The state also threatened to withhold funds from districts not in compliance. To confound the situation, a 1977 legislative act, the Moore Amendment, prohibited school districts from busing children solely to further desegregation.

---

[327] *Id.* at 224.
[328] Georgia NAACP v. Georgia, 570 F. Supp. 314 (S.D. Ga. 1983).
[329] Flax v. Potts, 567 F. Supp. 859 (N.D. Tex. 1983).

Two separate cases challenged the state rule implementing the Armstrong Act. Both appeals court decisions held that the fifteen percent requirement was arbitrary and violated the Moore Amendment.[330] The courts concluded that desegregation was one of several factors properly considered when attendance boundaries were set. The cases then were joined for appeal to the Illinois Supreme Court. In deciding against the state board, the Illinois high court concluded that the board was without authority to promulgate rules to enforce the Armstrong Act.[331] It was up to local districts to comply with the act directly, and the state board, the court concluded, was entitled only to refer discrimination cases to the state attorney general for prosecution. Broad statutory authority allowing the state board to set rules on the "operation of the public schools" did not include desegregation, the court added.

A Florida court considered a challenge to school boundary changes that were enacted by a county school board.[332] The changes served to maintain racial balance in Broward County high schools. The parents filing the suit argued that a fully desegregated system need not be concerned if resulting demographic shifts changed the racial balance in the schools. In addressing this claim the court concluded that the board may not have been obligated to redraw the boundaries but could do so because maintaining the racial mixture was a legitimate exercise of board policy-making powers. The parents' remedy, then, was political, not judicial.

---

[330] Aurora East Pub. School Dist. v. Cronin, 415 N.E.2d 1371 (Ill. App. Ct. 1981); Chicago Heights Pub. School Dist. v. Illinois State Bd. of Educ., 422 N.E.2d 898 (Ill. App. Ct. 1981); *see* YEARBOOK 1981 at 179.

[331] Aurora East Pub. School Dist. v. Cronin, 442 N.E.2d 511 (Ill. 1982).

[332] Plantation Residents Ass'n v. School Bd. of Broward Cty., 424 So. 2d 879 (Fla. Dist. Ct. App. 1983).

5

TORTS

Paul W. Thurston

Introduction 5.0
Negligence 5.1
  Student Injuries 5.1a
    School Settings During School Hours 5.1a(1)
    En Route to and from School 5.1a(2)
    School Buildings and Grounds 5.1a(3)
  Nonstudent Injuries 5.1b
Negligence Defenses 5.2
  Immunity 5.2a
    Common Law (Governmental) Immunity 5.2a(1)
    Statutory Immunity 5.2a(2)
  Other Defenses 5.2b
    Contributory Negligence 5.2b(1)
    Statute of Limitations 5.2b(2)
    Notice of Claim 5.2b(3)
    Comparative Negligence 5.2b(4)
Liability Insurance 5.3
Employee Injuries/Workers' Compensation 5.4
Assault and Battery 5.5
Defamation 5.6
Tortious Interference with a Contract 5.7
Products Liability 5.8
Invasion of Right to Privacy 5.9
Constitutional Torts 5.10
  Student-Initiated Cases 5.10a
  Employee-InitiatedCases 5.10b

5.0 INTRODUCTION

Torts is a general term used to define several independent civil causes of action based on noncontractual legal responsibilities that individuals have to avoid harming or injuring another's person, property, or reputation. The word "tort," derived from the Latin word "tortus" meaning "twisted," was at one time common in English as a general synonym for "wrong."[1] The general sense of tort as wrong suggests the difficulty involved in providing a precise definition. According to Proser, torts is "a body of law which is directed toward the compensation of individuals rather than the public, for losses which they have suffered in respect of all their legally recognized interests, rather than one interest only, where the law considers that compensation is required."[2]

Torts are actually separate, independent causes of action that define a particular level of conduct that the law recognizes individuals owe one another. The more common torts have developed historically and have been recognized for centuries. Examples of these range from negligence to assault and battery to libel and slander. But tort law is not static. As society changes, it is possible for courts to define new legal responsibilities between individuals. Constitutional torts is, for example, a particularly active area of litigation now.

This chapter will report on those cases that have been reported during 1983 that involve some type of tort claim within the school context. The cases are organized according to the particular type of tort involved. The categorization system employed will follow basically the format used in recent volumes of *The Yearbook of School Law*.

5.1 NEGLIGENCE

Negligence is the most common tort. In the lay person's mind negligence describes a type of conduct. But in a legal sense, for an injured party to secure monetary damages from another party for allegedly negligent action, the injured party will need to plead and prove, at minimum,[3] four elements.[4] Schools and their employees are not responsible as insurers for any and all injuries that occur. For liability to be present it must be shown that the school owes a particular duty to the injured person(s), that the bahavior fell short of that required, that this breach was the proximate cause of the injury, that there were real injuries, and that the plaintiff was not responsible for causing the injury. Let us briefly consider the first four elements that make up the prima facie case:

---

[1] W. Prosser, Handbook on the Law of Torts (4th ed. 1971).

[2] *Id.* at 6.

[3] The exact elements necessary for carrying the plaintiff's burden in the prima facie case will vary from state to state. Some states, for example, will require the plaintiff to plead an absence of contributory negligence while other states do not.

[4] *See* Prosser, *supra* note 1 for a more detailed description of elements of the prima facie case.

1. *Duty of Due Care.* There is a duty of due care that the law recognizes one person owes to another. It requires a certain standard of conduct for the protection of others against unreasonable risks. One has a legal duty to act as an ordinary, prudent, reasonable person in the circumstances. A child is expected to conform to the standard of care of a child of like age, education, intelligence, and experience.

The duty can be specified by statute or as a matter of common law. Usually in the school context, it is not hard to show that the school (and its teachers) have a duty to protect the health and safety of the students while they are in the custody of the school.

2. *A Breach of the Duty.* This amounts to a failure of one party to conform to the standard required toward another. This can occur either from an action or an omission. The breach of the duty of due care in a specific case is a question of fact. Making a showing of this breach involves both a showing of what actually happened and showing from these facts how the defendant acted unreasonably. Alleging failure to supervise, for example, is alleging that the teacher omitted or failed to take the appropriate action.

3. *Causation.* There needs to be reasonably close causal connection between the alleged misconduct and the resulting injury. This involves both a cause-in-fact relationship between the behavior and injury as well as the behavior and injury being sufficiently close in time and foreseeability.

4. *Actual Damages.* The plaintiff must show an actual loss or real damages. Nominal damages, to indicate a technical right, or the threat of future harm, not yet realized, are insufficient injury on which to bring a negligence action. The amount of damages awarded depend upon the particular circumstances of the person injured and what amout of money it will take to make that person whole.

There are two other components of the prima facie case that are basic to understanding its operation: foreseeability and the reasonable person standard. Foreseeability, which is either subsumed under the duty of due care element or the proximate cause element, means that the defendant could or should have seen the potentially dangerous consequences of the action when it was taken. This does not mean that the defendant subjectively or personally actually foresaw the potential danger. Rather, the defendant is presumed to be a reasonable person and the jury then is given instructions like the following to determine foreseeability: "Would you, as a reasonable person, standing in the place of Y defendant at X time, have foreseen the occurrence of Z injury?" Notice that under this instruction the jury enjoys the luxury of hindsight when determining foreseeability, something that often leads to sharper vision than the defendant actually may have had.

The application of these legal standards depends on the particular set of facts involved. The jury usually plays the central role as fact finder for all the elements of the prima facie case. Still, the judge controls, as a matter of law, which cases involve factual allegations sufficient to go to the jury. All the cases in this chapter involve questions of law. Presumably a much greater number of cases involving school negligence that are heard at the trial court level are decided by the jury and not appealed. These cases are not reported in any systematic way and are not reported in this chapter.

Torts, generally, and negligence, more so than other torts, are strictly a matter of state law. And, it is important to note at the outset, there is considerable variation between states in many areas of negligence law, particularly in the appropriate standard to be used for liability and the existence of immunity, to mention just two. This variation suggests that readers need to be cautious in applying a case decided in one state to another state. Extreme caution is appropriate when thinking about the precedential value of one case to another state. It is, of course, possible for a case to have precedent to another state if the same mode of analysis is applied. Determination of the existence of a duty of due care in a particular situation will often have transferability from one state to another, for example. But because of the diversity between states, both as to their statutes and earlier judicial decisions, caution is advised. It is quite possible, for example, to take the same fact situation and get quite different results in two different states because of different standards being applied.

5.1a Student Injuries

Schools have a duty to protect the health and safety of students while they are in their charge. Consequently, when students are injured it is common to inquire whether the injury is due to a breach of this duty by a school employee. There is also a strong financial incentive to bring an action against a teacher or a school district because of the availability of money to pay the damages. Since the circumstances will determine the liability and because the circumstances vary widely, it is instructive to look at the following cases reported in the past year that involved student injuries. The cases are organized in general categories according to the location where the injury occurred.

5.1a(1) School Settings During School Hours

Several of the cases reported last year in this area are instructive about the significance of finding a breach of a duty of due care. It is not enough to simply have a student suffer an injury, but the injury must result from an action or inaction of someone else by whom the action or inaction should have occurred.

For example, in a Pennsylvania case, a fifth-grade student, returning to the classroom from recess, was struck in the eye by a pencil that had been propelled from the hand of a classmate. The teacher was outside the classroom monitoring the return of the students from recess when the injury occurred. The student who dropped or threw the pencil and two other students had been required to remain in the classroom during recess as punishment for misbehavior at breakfast. The students were told to take their seats when the teacher stepped outside to supervise the return from recess. The trial court found the teacher negligent and awarded $15,000 to the injured party. The appellate court reversed,[5] holding that the momentary absence of the teacher was authorized for purposes of monitoring the return of thirty students from recess. This momentary absence from the classroom was not negligence, and therefore there was no libility for the student injury that occurred.

A sixth-grader was struck in the eye by a pencil that slipped from the hands of two classmates who were scuffling over it. This incident occurred at a time when the students had just returned. The district and the absent teacher were sued for the loss of vision in the eye because of the teacher's alleged negligence in not being present at all times to supervise the students. In weighing this claim the court had to articulate a standard for the teacher's duty of due care.[6]

> [W]e are persuaded that foreseeability of harm to pupils in the class or at the school is the test of the extent of the teacher's duty to safeguard her pupils from dangerous acts of fellow pupils, and absent circumstances under which harm to her pupils might have been reasonably foreseen during her absence, that [the teacher] was not under a duty to either remain with her class at all times or to provide other adult supervision at all times while she was absent.[7]

Based on this, and insufficiently serious incidents to put the teacher on notice about safety concerns in the classroom, the North Carolina Court of Appeals affirmed the lower court's directed verdict dismissing the claim against the teacher and the district.

During playground recess one kindergarten student threw a stick, injuring the eye of a classmate. The injured student brought an action against the district for inadequate supervision. The District of Columbia Court of Appeals dismissed the action, holding that the level of teaching supervision on the playground satisfied the supervision standard and that there was no showing that there was a breach of duty by the district.[8] The school district is not strictly liable for all injuries that may occur to the children. Here there is no demonstrated breach of duty by the district. But, even assuming that it could be shown that there was a breach of duty, the district is not liable, because there was no showing that a violation of the reasonable standard of care was the proximate cause of the injury. Rather the injury was the consequence of an unforeseeable, intervening act of a third party that could not be anticipated or prevented.

---

[5] Simonetti v. School Dist. of Philadelphia, 454 A.2d 1038 (Pa. Super. Ct. 1982).

[6] James v. Charlotte-Mecklenburg Bd. of Educ., 300 S.E.2d 21 (N.C. Ct. App. 1983).

[7] *Id.* at 24.

A twelve-year-old boy who was playing ball in the school yard during noon recess was struck in the mouth by a rock thrown by another child. At the time of the incident there were about 170 students playing in the yard with three school teachers on duty to supervise the children. A negligence action was filed on the basis that an unpaved area of the playground constituted an unreasonably hazardous condition. The appellate court affirmed the trial court in dismissing the action on the basis that there was insufficient evidence to support the claim that an unreasonably hazardous condition existed. In addition, the supervision was adequate for the playground and number of students using it.[9]

A student was injured in physical education class while vaulting over vaulting horse in which pommels on horse had been removed. The Minnesota Supreme Court held the jury could find negligence if it were persuaded by the evidence that the prevailing custom of using vaulting horses with exposed holes fell below requirements of reasonable care.[10] It also held there was insufficient evidence of negligence on part of manufacturer shown.

A kindergarten student, injured when a deep-fat fryer being used to deep-fat fry donuts in the shape of the letter D was tipped over, brought a negligence action against the school district, the principal, and the teacher. The Oklahoma Supreme Court reversed the appellate court and reinstated the trial court decision in which the principal was dismissed from the action and the jury found for the teacher and the school district.[11] The Supreme Court reinstated the trial court decision because the exposure of the students to the plugged-in deep-fat fryer could not be treated as either negligence per se or as an ultrahazardous activity. Rather, since there was no undisputed proof of negligence, liability should appropriately be decided by the jury. Therefore, the jury verdict was reinstated.

---

[8] District of Columia v. Cassidy, 465 A.2d 395 (D.C. 1983).

[9] Hampton v. Orleans Parish School Bd., 422 So. 2d 202 (La. Ct. App. 1982).

[10] Tiemann v. Independent School Dist. No. 740, 331 N.W.2d 250 (Minn. 1983).

[11] Wetsel v. Independent School Dist. I-1, 670 P.2d 986 (Okla. 1983).

A high school senior filed a negligence action against the high school coach for not filing timely letters of reference for possible receipt of a basketball scholarship from a university. The appellate division affirmed dismissal of the case because there was no duty owed by the coach to the student.[12] There was certainly no rule or regulation that could be alleged on the basis of such a duty, and the court refused to recognize that such a duty had arisen through custom.

A teacher's duty to conduct classes so as not to expose students to unreasonable risk of injury was not breached when a student tripped and fell while carrying heavy metal at a vocational-technical school, since the twenty-nine-year-old student, who had been taught to use cutting torch and instructed to cut metal into three pieces before moving it, should have been able to carry out instructions without need of supervision. The student's negligence was the sole cause of the accident because he failed to follow instructions. Judgment was awarded to the school district.[13]

A school district had a summer youth program, and two fifteen-year-old students assigned to assist the custodial staff took some magnesium powder and potassium nitrate from glass jars and put it into bushes below where they intended to retrieve it after work. That day an eight-year-old who lived near and often played at the school discovered the bags and began playing with the chemicals and matches he had found earlier. The boy suffered second-degree burns when the chemicals exploded. The New York Court of Appeals affirmed the trial court decision holding the district liable in negligence for the injury.[14] The school district had a duty to maintain its property in a safe condition. Injury to someone playing on the school grounds was foreseeable. The district did not take reasonable care in appropriately securing the chemicals in such a way that unsupervised access could not be obtained. The central claim of the district was that the fifteen-year-old students had stolen the chemicals outside of the scope of their employment, and that this broke the causal chain between the duty of the school and the injury. Yet, the court rejected this because it finds that this type of intervening act was a natural and foreseeable consequence of the circumstances created by the school district. Since this theft was reasonably foreseeable and not adequately protected, the school district maintains liability for the injury.

---

[12] Hunt v. Scotia-Glenville Cent. School Dist., 460 N.Y.S.2d 205 (N.Y. App. Div. 1983).

[13] Lemelle v. Louisiana, 435 So. 2d 1162 (La. Ct. App. 1983).

[14] Kush v. City of Buffalo, 462 N.Y.S.2d 831 (N.Y. 1983).

A fourteen-year-old dislocated an elbow upon running into the wall while running the speed test of the New York physical fitness test in a gym class. Because of specific warnings about safety consideration and because the State Physical Fitness Screening Test Manual specified fourteen feet of clearance space beyond the finish line, where the school provided only eight, a New York Supreme Court, Appellate Division held that there was sufficient proof from which a jury could conclude that the instructor was negligent with respect to both the design of the course and the failure to give proper instructions.[15] A new trial was granted.

A third-grade girl suffered an intraoccular hemorrhage when she was struck in the eye by an apple thrown by a student. The Louisiana Court of Appeal affirmed the trial court decision that there was negligence on the part of the school for providing inadequate supervision in the bathroom area of the school. It also affirmed the award of $3,000 in general damages and $970 in special damages since there was no permanent residual disability.[16]

An eleven-year-old, fifth grader suffered severe dental injuries when struck in the mouth by a hockey stick. The injury occurred in an after-school intramural floor hockey program when the stick blade of another player hit him on the follow-through of a shot. The Superior Court of Pennsylvania affirmed the trial court verdict of negligence against the Philadelphia Board of Education.[17] The coach of the program had sought safety equipment from the board but had not received it. And although no regulations required mouth guards for participants in amateur ice or floor hockey, there was sufficient danger involved in participating for the board to take responsibility for it.

5.1a(2) En Route to and from School

Schools have some responsibility for the safe movement of students to and from school. The precise extent of this responsibility depends on whether busing is involved and the nature of the risk in coming to school. Two cases were decided in this area last year.

The usual rule is that school districts are not legally responsible for accidents that students may suffer once they have been released from school or before they arrive at school. But in a recent California case a twelve-year-old was asked to stay after school to help her teacher grade papers. By the time the student left school the street crossing guards were off duty, and the girl was injured by a car while trying to cross the busy, unguarded street. The court of appeal refused to dismiss the action against the district holding that there was sufficient causation between the action of the teacher and subsequent injury of the child off the school premises to go to the jury.[18]

---

[15] Ehlinger v. Board of Educ., 465 N.Y.S.2d 378 (N.Y. App. Div. 1983).

[16] Carson v. Orleans Parish School Bd., 432 So. 2d 956 (La. Ct. App. 1983).

[17] Berman v. Philadelphia Bd. of Educ., 456 A.2d 545 (Pa. Super. Ct. 1983).

A nine-year-old girl was injured while crossing an intersection one-half block from school while on her way to school. Her father sued the crossing guard for alleged negligence for not assisting his daughter at the crossing. Since the injury occurred prior to 7:30 A.M., the time the crossing guard was scheduled to begin working the intersection, the trial court ordered a summary judgment for the defendant on the grounds that there was no duty on the part of the guard to act toward the child in any particular way prior to 7:30 A.M. Pursuant to the trial plaintiff got testimony from the principal that the crossing guard was on duty prior to 7:30. For this reason the court of appeal reversed the summary judgment, thereby allowing the matter to proceed to trial and consideration of the factual dispute so as to determine the level of the duty of care involved.[19]

5.1a(3) School Buildings and Grounds

There is a duty owing to the children regarding the safety of the buildings and the grounds. Two cases were reported in this area during 1983.

A six-year-old was injured at a construction site next to an elementary school where remodeling was being done. Where the school officials knew of the potential dangers at the construction site (in fact school officials reminded the students daily to stay away from the site) and provided no supervision, the District of Columbia Court of Appeals affirmed the trial court's finding of negligent supervision.[20]

In a New York case snowmobilers had collided with a snow-covered bench at night on a snow-covered baseball field on school district grounds. The appellate court ordered a summary judgment for defendant school district because there was no disputable fact that could show that the bench became a dangerous instrumentality that the school district maliciously failed to guard or warn against.[21]

---

[18] Perna v. Conejo Valley Unified School Dist., 192 Cal. Rptr. 10 (Cal. Ct. App. 1983).
[19] Scott v. Farrar, 188 Cal. Rptr. 823 (Cal. Ct. App. 1983).
[20] District of Columbia v. Royal, 465 A.2d 367 (D.C. 1983).
[21] Mattison v. Hudson Falls Cent. School Dist., 458 N.Y.S.2d 726 (N.Y. App. Div. 1983).

5.1b Nonstudent Injuries

School districts have a duty of reasonable care to teachers and other adults and there were two cases reported in this area.

The Utah Supreme Court reversed the trial court that had dismissed a complaint for injuries suffered by a woman who slipped and fell on an icy sidewalk leading to the side entrance of the school. The supreme court held that the school district has a duty to maintain their buildings and grounds in a reasonably safe condition and to remove dangers.[22] Therefore the plaintiff is entitled to a trial on the issue of the school district's negligence in failing to maintain in a safe condition the sidewalk leading to the building.

An action against two students, who had allegedly dared, and thereby encouraged, others who knocked a waste basket off the landing injuring a teacher standing below, was dismissed because there was insufficient testimony to establish specific wrongdoing.[23]

5.2 NEGLIGENCE DEFENSES

Even if the injured plaintiff can satisfy the prima facie case, the defendant teacher or school district or administrator still has a number of defenses available to overcome the claim. These defenses range from immunity—either common law sovereign immunity or statutory immunity—to the more usual affirmative defenses to the introduction of a different standard of liability. The reader should be alert to the divergent motivations underlying these defenses. Immunity, for example, limits the flow of public money to private citizens because liability payments will detract from the educational functions of the schools, whereas the affirmative defenses keep the plaintiffs from recovering for behavior that in some way was responsible for the injury that occurred.

5.2a Immunity

5.2a(1) Common Law (Governmental) Immunity

A quarter of a century ago, tort liability in public schools was almost nonexistent because of sovereign immunity enjoyed by the state. Sovereign immunity has eroded to a great extent—though it still exists in several states. In many states the courts have abolished sovereign immunity or the legislatures have abolished it or passed some substitute form of statutory immunity. Ohio joined this group of states abolishing sovereign immunity.

---

[22] Gurule v. Salt Lake City Bd. of Educ., 661 P.2d 957 (Utah 1983).

[23] Kline v. Ball, 452 A.2d 727 (Pa. Super. Ct. 1982).

The Supreme Court of Ohio held that the defense of sovereign immunity is not available to a board of education in an action seeking damages for injuries allegedly caused by the negligence of the board's employees.[24] This is the latest of a line of cases abrogating the doctrine of governmental immunity.

In a Florida case a father brought a suit against the school board seeking damages for the death of his eleven-year-old child who was struck by an automobile while en route to catch a school bus at an allegedly negligently located bus stop. The Florida Supreme Court, affirming the appellate court decision, held that the designation of school bus stops is a planning level decision that is immune from tort liability under the doctrine of sovereign immunity and that the amended complaint failed to allege sufficiently the existence of a known trap or dangerous condition that would create an operational level duty to post warnings.[25]

5.2a(2) Statutory Immunity

There are a variety of ways in which a statute can limit liability of a school district. One is to put a monetary limit on the maximum claim that a successful plaintiff can recover. Another way is to provide governmental immunity generally with specific statutory exceptions allowed. This is an area where there is a large amount of litigation because of cases testing the limits of the statute or its exceptions.

The South Dakota Supreme Court held that, consistent with a 1981 decision that refused to judically abolish sovereign immunity,[26] in the absence of a statute waving sovereign immunity from tort liability, the statute authorizing a school district to sue and be sued did not create a cause of action in tort.[27]

The Missouri Supreme Court decided a case alleging that a school district waived its claim to sovereign immunity by carrying liability insurance that would have covered the injuries that occurred on the bus. But the court refused to do this, holding that sovereign immunity is to be interpreted broadly with few execptions.[28] Since this insurance coverage is not one of the exceptions provided in the statute it is not available.

The North Carolina Court of Appeals held that a school board was statutorily immune from liability for injuries sustained by a minor as a result of a fall from gymnasium bleachers to the floor in a gymnasium leased to the city.[29]

---

[24] Carbone v. Overfield, 451 N.E.2d 1229 (Ohio 1983).

[25] Harrison v. Escambia Cty. School Bd., 434 A.2d 316 (Fla. 1983).

[26] Merrill v. Birhanzel, 310 N.W.2d 522 (S.D. 1981); *see* THE YEARBOOK OF SCHOOL LAW 1982 (P. Piele, ed.) at 196.

[27] Guillaume v. Staum, 328 N.W.2d 259 (S.D. 1982).

[28] Bartley v. Special School Dist. of St. Louis Cty., 649 S.W.2d 864 (Mo. 1983) (en banc).

The Chicago Board of Education was sued when a child was injured as a result of a fall from a swing on the school playground. The case was dismissed because the plaintiff had not alleged willful and wanton misconduct as required pursuant to section 3-106 of the Local Governmental and Governmental Employees Tort Immunity Act.[30]

In this case the Illinois Appellate Court rejected attractive nuisance as a theory for imposing liability upon a school district for the injury of a student on the school playground.[31] The doctrine of attractive nuisance was inapplicable and did not negate the immunity available to the district under state statute.

The doctrine of attractive nuisance recognizes an exception to the general rule that an owner or occupier of land is under no duty to keep the premises in any particular condition to promote the safety of persons who come onto the land uninvited. The exception occurs where a child, whose presence on the land is foreseeable, is injured due to a condition on the property that is hazardous by reason of the child's inability to appreciate the risk involved. The attraction element is no longer significant except as to the extent that it indicates whether the landowner should have anticipated the presence of children on the premises.

A sixteen-year-old high school junior gymnast suffered paralysis from spinal injuries sustained from an incorrect dismount from the rings during a late afternoon practice session of the gymnastics team. The coach and the board of education were sued on both the theories of negligence (negligently failing to properly supervise and negligently failing to ensure proper use of safe equipment) and willful and wanton misconduct. A third charge was made only against the board in that it had negligently failed to supply the gym with adequate safety equipment. The trial court dismissed the negligent supervision claim, and the jury found for the coach and school district on the other two claims. The Illinois Appellate Court affirmed the trial court.[32] Statutory immunity covers injuries such as these that occur in extracurricular athletic programs. Speculation about use of additional matting and its part in possibly avoiding the injury was insufficient to overturn the jury decision that the conduct of the board was not willful and wanton by providing unsafe equipment. Under previous Illinois case law this statutory immunity protects teachers from liability for student injuries

---

29. Plemmons v. City of Gastonia, 302 S.E.2d 905 (N.C. Ct. App. 1983).
30. Ill. Rev. Stat., ch. 85:3-106 (1979).
31. Jackson v. Board of Educ. of City of Chicago, 441 N.E.2d 120 (Ill. App. Ct. 1982).
32. Montag v. Board of Educ., 446 N.E.2d 299 (Ill. App. Ct. 1983).

unless willful and wanton misconduct is shown.[33] Where equipment is involved, the school district is responsible for providing safe, usable equipment.

The New York appellate court rejected the contention that sovereign immunity protected the school district and the municipality from any liability when a voter fell and injured herself after leaving the elementary school where she had gone to vote in a general election.[34]

A woman attended a chili supper on school property and was injured when she tripped on a metal grate on school property. The subsequent suit against the district for negligence in not having proper lighting was not barred by statutory exemption from limited liability imposed by tort claims act, which provides that a political subdivision or an employee of a political subdivision who enters upon any property on or under express or implied authority of law shall not be liable if a loss results from such entry.[35]

The uncertainty over the precise scope of Michigan's sovereign immunity defense in the public school context continues. In one recent case the parents of child diagnosed and treated for two years as suffering from a "delayed articulation" problem, but who was in fact suffering from a "language impairment," sued the district and the teacher for this misdiagnosis. The Michigan Court of Appeals held that both the school district and the teachers were immune from liability.[36] The school district was engaged in a governmental function. In addition, the speech therapy program was a governmental function, and the teachers acting in the program were operating within the scope of their duty and were also covered by this governmental immunity.

In a second case a high school student suffered an eye injury at the site of a house construction project as part of a building trades class. He was barred from bringing an action against the school district or teachers because of governmental immunity. The Michigan Court of Appeals affirmed this holding that the operator of a building trades class as part of a high school curriculum was a governmental function that entitled the school district to governmental immunity.[37] The court also held that the shops trade supervisor and the building trades class teacher were also engaged in a governmental function and, therefore, also enjoyed the same governmental immunity.[38]

---

[33] *See* Kain v. Rockridge Commun. Unit School Dist. No. 300, 453 N.E.2d 118 (Ill. App. Ct. 1983) (school district and coach immune under state statute from alleged negligence in allowing student to play in a football game, in which he was injured, even though he had not participated in the minimum number of practice sessions required by the high school association).

[34] Pujolas v. Town of Tonawanda, 458 N.Y.S.2d 779 (N.Y. App. Div. 1983).

[35] Smith v. Broken Arrow Pub. Schools, 665 P.2d 858 (Okla. Ct. App. 1983).

[36] Brosnan v. Livonia Pub. Schools, 333 N.W.2d 288 (Mich. Ct. App. 1983).

[37] Regulshi v. Murphy, 326 N.W.2d 528 (Mich. Ct. App. 1982).

The Commonwealth Court of Pennsylvania dismissed a complaint against a school district where a minor was assaulted late at night while walking on a sidewalk adjacent to school and forcibly taken through an unsecured gate in the fence around the school to an unlighted area of school grounds where she was beaten. The school district was immune from liability, and the facts do not come within the exception for negligence in the maintenance and control of school property.[39] Violent criminal acts as occurred here are not a reasonably foreseeable use of school property such that the exception will be applied.[40]

Because of statutory immunity barring any negligence claim the father of a boy hit by a baseball bat by another student during recess brought action against the board of education under a contract theory. In a per curiam decision the Alabama Supreme Court held that the board of education was not under an express or implied contractual obligation to maintain a safe atmosphere for students under the supervision during school hours.[41]

5.2b Other Defenses

5.2b(1) Contributory Negligence

In the case where the eleven-year-old was injured in the floor hockey program the school board alleged contributory negligence and assumption of risk on the part of the student. For minors between the ages of seven and fourteen Pennsylvania has a rebuttable presumption that the minor is incapable of contributory negligence. A rebuttal of the presumption must review the conduct in light of the behavior of a child of similar age, intelligence, or experience. The appellate court could not find any superior intelligence or experience to overcome this presumption.[42]

---

[38] *See also* Grames v. King, 332 N.W.2d 615 (Mich. Ct. App. 1983) (school district and employees protected by governmental immunity in suit that arose in injury from an assault in a locker room following girls' basketball game because the planning and carrying out of the girls' basketball program was a governmental function); and Boulet v. Brunswick Corp., 336 N.W.2d 904 (Mich. Ct. App. 1983) (summary judgment for football coaches because of statutory governmental immunity they enjoy so long as they perform their duties within the scope of their employment).

[39] Vann v. Board of Educ., 464 A.2d 684 (Pa. Commw. Ct. 1983).

[40] *See also* Auerbach v. Council Rock School Dist., 459 A.2d 1376 (Pa. Commw. Ct. 1983) (action against school district for improper supervision dismissed because of statutory immunity enjoyed by the school district); and Lewis v. Hatboro-Horsham School Dist., 465 A.2d 1090 (Pa. Commw. Ct. 1983) (summary judgment awarded for coach and district dismissing negligence because no exception of the statutory immunity applied where cause of the eye injury was not negligence in care, custody, and control of the district's baseball field, but was action of baseball coach in hitting line drive while player was rounding the bases).

[41] Brown v. Calhoun Cty. Bd. of Educ., 432 So. 2d 1230 (Ala. 1983).

Unlike New York courts, where assumption of risk and contributory negligence affirmative defenses have been eliminated by the comparative negligence standard, the Pennsylvania courts continue to consider assumption of risk and contributory negligence as separate defenses. Still, the appellate court did not find sufficient evidence to support the trial court conclusion that the eleven-year-old boy's participation in the game amounted to an assumption of risk for this particular type of severe dental injury.

The Tennessee Supreme Court affirmed the decision of the court of appeals that the negligence of a twelve-year-old student in leaning out of a window on the right-hand side of a school bus as it moved forward was a proximate rather than a remote cause of fatal injury to the student.[43] The student was struck in the head by a guy wire supporting a utility pole. The conclusion that this action by a twelve-year-old was the proximate cause of the injury was supported by a preponderance of evidence indicating that the student was bright, alert, and intelligent, and that the student had been repeatedly instructed by monitors against placing his hands or other parts of his body outside windows of the bus when the vehicle was in motion. This finding acts as a total bar to recovery, whereas a finding of remote contributory negligence would have allowed some allocation of damages between the parties.

A school bus stalled on the way to school. A nine-year-old and a ten-year-old left the bus to call the school and inform it of the difficulties. They successfully crossed the four lanes of the highway to get to the phone, but upon returning to the bus the nine-year-old got separated from the older child at the median. As she stepped off the median the child was struck by an oncoming car that was not being negligently driven. The trial court dismissed the action against the school and bus driver. The appellate court reversed, holding that the nine-year-old was not contributorily negligent as a matter of law and that there was sufficient evidence to go to the jury on the question of proximate cause of the bus driver's negligence in allowing the child to cross the dangerous highway.[44]

On the contributory negligence claim North Carolina law has a rebuttable presumption that a nine-year-old child is incapable of contributory negligence. This is an issue of fact to be determined at trial. The appellate court was also persuaded that there were sufficient facts to go to the jury on the questions of whether the school and bus driver had breached a duty to this minor bus rider and whether the bus driver's negligence was a proximate cause of plaintiff's injuries.

---

[42] Berman v. Philadelphia Bd. of Educ., 456 A.2d 545 (Pa. Super. Ct. 1983).

[43] Arnold v. Hayslett, 655 S.W.2d 941 (Tenn. 1983).

[44] Sharpe v. Quality Educ., 296 S.E.2d 661 (N.C. Ct. App. 1982).

5.2b(2) Statute of Limitations

Some states limit claims against school districts by placing a more restrictive statute of limitations on the initiation of a suit.

In an action by an injured football player against the state athletic association for negligence in not recommending preseason football contact safety recommendations to member schools, which was filed after the statute of limitations had expired, the Oregon Court of Appeals affirmed the trial court in holding that the statute was tolled.[45] There were factors concerning the role of the state athletic association, particularly its part in failing to recommend policies supported by the national advisory body, which could not have been discovered earlier. Therefore, the statute was tolled and the action against the athletic association was timely.[46]

5.2b(3) Notice of Claim

In a New York case an appeal of a summary judgment dismissing actions was denied. Plaintiffs did not qualify for serving a late notice of claim. General knowledge of the accident and receipt of statements for certain medical and dental expenses within ninety days from date of accident did not satisfy requirement of a written notice of a trial claim.[47]

5.2b(4) Comparative Negligence

The comparative negligence doctrine is becoming increasingly important. Yet in one recent case in Maryland the court refused to substitute comparative negligence for contributory negligence. In cases from Rhode Island and Kansas the state supreme courts had to determine the applicability of comparative negligence doctrine to some unusual circumstances.

A fourteen-year-old student injured while attempting a front forward flip sought to have the common law doctrine of contributory negligence judicially abrogated and the doctrine of comparative negligence adopted in its place in negligence actions in Maryland.[48] In a scholarly opinion tracing the history of contributory and comparative negligence and charting the increasing popularity of comparative negligence the Maryland Court of Appeals concluded that it was not willing to make the switch by judicial decree but would defer to the legislature.

---

[45] Peterson v. Multnomah Cty. School Dist. No. 1, 668 P.2d 385 (Or. Ct. App. 1983).

[46] *See also* Cinnaminson Twp. Bd. of Educ. v. United States Gypsum, 552 F. Supp. 855 (D.N.J. 1982) (federal district court refused to allow a summary judgment for denial of a tort claim based on strict liability tort theory, although it did bar warranty claims because they were filed outside of the four years defined as the outer limit in the statute)

[47] Briganti v. Harrison Cent. School Dist., 457 N.Y.S.2d 89 (N.Y. App. Div. 1982) *See also* Nicholson v. Board of Educ., 339 N.W.2d 482 (Mich. Ct. App. 1983) (workers compensation claim barred when filed more than five-and-one-half years after stroke although the board had simple knowledge of employee stroke).

On appeal of a judgment in excess of $2 million for the serious injury of a football player, the Rhode Island Supreme Court reviewed the decision and affirmed the award. The jury had initially awarded $3.5 million in damages but this was reduced to $2.1 million by the finding of 40 percent comparative negligence of the plaintiff football player and 60 percent negligence of the helmet manufacturer. The plaintiff appealed the application of this comparative negligence standard to reduce damages based on strict liability and breach of implied warranty. After a careful analysis of the statute and consideration of the distinguishing principles of negligence, strict liability, and implied warranty, the Rhode Island Supreme Court held that comparative negligence applies to all these causes of action.[49]

A school district brought an action against a roofing manufacturer for damages from a leaking roof, and the roofing manufacturer joined the architects, roofing contractors, and manufacturer of insulating material on which roofs were placed as third-party defendants. The Kansas Supreme Court affirmed the dismissal of the third-party defendants.[50] The decision distinguished between actions emanating in contract and torts. The concept of joint and several liability between tortfeasors has been replaced in Kansas by comparative negligence. Where comparative negligence is in issue the court deals in percentages of causal responsibility, expressed in degrees of comparative fault or causation by percentage. But comparative negligence is not applicable to contract law where, under a breach of warranty theory, the injury is simple economic loss. Comparative negligence is not applicable as basis for bringing third-party defendants into this action. The roofing manufacturer entered into a guarantee contract with the district to which the third-party defendants are not parties. Therefore, since there is no tort or contractual claim by which to bring these third-parties into the action they are dismissed. If the general roofing manufacturer is liable to the district it then has a right of subrogation in a separate action against those whose fault actually caused the damage to occur to the roofs.

---

48. Harrison v. Montgomery Cty. Bd. of Educ., 456 A.2d 894 (Md. 1983).
49. Fiske v. MacGregor, Div. of Brunswick, 464 A.2d 719 (R.I. 1983).
50. Haysville Unified School Dist. No. 261 v. GAF Corp., 666 P.2d 192 (Kan. 1983).

5.3 LIABILITY INSURANCE

The basketball coach who was driving a van of players after a basketball game got into an accident. The van belonged to the principal of the school who had given express authority for it being used to transport players to the game. The insurer of the van settled with the injured students and sought contribution from the school district's insurer. The Alaska Supreme Court held that no contribution was required because the coach was not covered under the policy that the school district carried.[51] The van was not "owned" by the school district nor was it a "hired automobile" under the terms and definitions of the policy.

The insurer of the school district filed an action for contribution against the teacher's insurer. The Oregon Court of Appeals dismissed the action.[52] The court held that the school district's insurer could not claim contribution from the teacher's insurer since the teacher was not responsible to pay damages for his negligence so long as he was acting within the scope of his employment and therefore no obligation could arise in favor of the school district because of its having paid a settlement to student injured because of the teacher's negligence under statute mandating that district must indemnify the teacher.

The existence of insurance which, by its terms, does not cover punitive damages will act to waive immunity only as to claims for compensatory damages. In an Illinois case the action for punitive damages was dismissed, while the action for compensatory damages was remanded to the trial court for consideration on its merits.[53]

General allegations of negligence in complaint against employer were sufficient to involve insurer's obligation to defend action seeking damages for death of employee. Yet the insurer had no obligation to defend the school district in two actions for which there was no explanation of the legal theory upon which sums were sought. To the degree an inference was possible, damages sounded in contract, which the policy specifically excluded.[54]

Where there are two fires at two different places with two separate causal factors, there are two "loss occurrences," and whether they were set by one individual or different individuals or groups of individuals was of no consequence. The deductible applies, therefore, to each occurrence.[55]

---

[51] Insurance Co. of North America v. State Farm Mutual Auto. Ins. Co., 663 P.2d 953 (Alaska 1983).

[52] United Pacific/Reliance Ins. Co. v. Horace Mann Ins. Co., 670 P.2d 172 (Or. Ct. App. 1983).

[53] Collins v. School Dist. No. 189, 450 N.E.2d 387 (Ill. App. Ct. 1983).

[54] Bryam Hills Cent. School Dist. v. State Ins. Fund, 476 N.Y.S.2d 690 (N.Y. App. Div. 1983).

The Eleventh Circuit Court of Appeals affirmed summary judgment dismissing action against insurer seeking payment of full cost of attorney's fees incurred by policy-carrying principal who had been a defendant in a civil rights action because the $1,000 exclusionary limit in the policy was clearly stated and fit the facts of the case.[56]

5.4 EMPLOYEE INJURIES/WORKERS' COMPENSATION

Most negligence claims or injuries are brought by students, but it is possible for teachers or administrators to be injured and bring a negligence action against the district. But there is an alternative, workers' compensation, which is available in most states, that provides an alternative remedy for employee injury that occurs as part of employment and does not require a showing of fault on the part of the district. Several cases were reported in this area in 1983 and they provide insight into the boundaries of the worker's compensation claim.

A substitute teacher, on a November day, was accosted on her way home. She was knocked to the ground in a scuffle for her purse, and she suffered leg and back injuries and also bumped her head on the sidewalk. In March of the following year the substitute had an infection that caused deafness in one ear. The Illinois Supreme Court affirmed an arbitrator's decision, subsequently upheld by the industrial commission and the circuit court, that the teacher did not qualify for workmen's compensation because she did not prove that her injury arose out of and in the course of her employment.[57] The physical assault in November took place outside of school, and it was not demonstrated that this was linked to the ear infection. Evidence suggested that the hearing loss was due to a virus, and there was no indication that she contracted the illness from a child with a contagious disease. Nor did the eivdence prove that her apparent infection resulted from overheating or unsanitary conditions at the schools in which she taught.

The Illinois Supreme Court affirmed a decision of the industrial commission in which the Board of Education of the City of Chicago challenged is liability for payment of workmen's compensation in bad faith. The board of education could not satisfy the standard of objective reasonableness in challenging the award. Attorney fees and penalties for the bad faith and vexatious delay were also upheld.[58]

---

[55] Goose Creek Consol. I.S.D. v. Continental Cas. Co., 658 S.W.2d 338 (Tex. Civ. App. 1983).

[56] Smith v. Horace Mann Ins. Co., 713 F.2d 674 (11th Cir. 1983).

[57] Rosenbaum v. Industrial Comm'n, 444 N.E.2d 122 (Ill. 1982).

> [W]hen the employer's refusal to pay benefits is founded on a challenge to liability that is not in good faith, allowing him freedom from an award of attorney fees might encourage him to delay matters indefinitely in the Industrial Commission and the courts until the claimant decides it would be easier to settle for a small part of what is legally his due than to spend the time and money that would be required to stick it out to the end. The overriding purpose of the Act, especially as expressed through its penalty sections, is to compensate claimants as early and as thoroughly as possible for income lost due to job-related injuries.[59]

A Louisiana appellate court affirmed a trial court decision awarding a school janitor total and permanent disability for back injuries suffered as a result of lifting garbage cans.[60] The injury occurred in the course of the janitor's employment, and it was immaterial that the diseased or weakened condition of the janitor's back might eventually have produced disability outside the employment situation. The court of appeal reversed the statutory penal penalty levied against the school district. This was reversed because the court of appeal found there was supporting facts for a good faith defense against the workmen's compensation claim. The janitor had not filed an accident report, and he had not complained of the pain being work related when he told the district administrator.[61]

A Louisiana trial court awarded workmen's compensation benefits for a sixty-three-year-old, overweight teacher who suffered back injuries when she was run over by several students in the school gymnasium. The school district argued that the teacher's long-term back and neck pain did not arise from the injury, but rather resulted from her age, obesity, and preexisting arthritis. The Louisiana appellate court affirmed the trial court, articulating the standard that a person can be compensated even if there is a preexisting condition so long as a work-related accident causes the disability even though the accident would not have resulted in a disability in a person without the condition.[62]

---

[58] Board of Educ. of City of Chicago v. Industrial Comm'n, 442 N.E.2d 861 (Ill. 1982).

[59] *Id.* at 867.

[60] Robichaux v. Terrebonne Parish School Bd., 426 So. 2d 241 (La. Ct. App. 1983).

[61] *See also* Celestin v. Fireman's Fund Ins. Co., 430 So. 2d 1263 (La. Ct. App. 1983). (Louisiana Court of Appeal affirmed trial court decision finding the claimed injuries to be work related and making an award for total and permanent disability.)

[62] Martin v. Orleans Parish School Bd., 427 So. 2d 83 (La. Ct. App. 1983).

In a workman's compensation case the California Supreme Court annulled the decision of the workers' compensation appeals board and remanded the case.[63] A school teacher was assaulted in her car immediately after leaving the school parking lot to go home from work under circumstances in which the teacher's car was immobilized by departing school children who blocked traffic. Usually, the application of a rule that treats someone going and coming to work as not covered under workmen's compensation would have barred recovery. Yet where the employment creates a special risk that extends beyond the boundary of the employment premises, compensation is allowed if injury occurs within the zone of that risk. In this case such a special risk did exist because the flow of children impeded the teacher's departure from school, and thus she was still eligible for compensation for injuries resulting from this assault.

An assistant superintendent suffered a fatal heart attack during a presentation to the board of education about a controversial school consolidation proposal, and his widow sought workmen's compensation benefits. She alleged that his death was caused by unusual stress on the job the day of the heart attack, which included a visit by the fire marshall who cited the district for thirty-eight violations, an investigation of a minor bus accident, and the presentation to the board on the conterversial topic. The state industrial board denied the claim because it was not persuaded that unusual stress occurred, but rather emphasized the bad heart condition of assistant superintendent, his unpromising genetic history, and the bad health condition he was in. The Indiana Court of Appeals affirmed the denial of compensation because the industrial board decision was not contrary to the evidence.[64]

A teacher was an employee of a school district when she was injured attempting to intervene in a fight between students, and the teacher filed for and received workers' compensation benefits. She then sought recovery under school district policy, which provided that the district would reimburse the teachers for reasonable costs incurred as a result of assault sustained by the teacher in the course of employment. The Texas Court of Appeals remanded this claim for trial on the merits because it could not see how the worker's compensation award could be treated as the exclusive remedy.[65]

An employee who had been injured when a box of cans fell on her and injured her shoulder and back sought reimbursement of benefits after returning to work had not satisfactorily carried her burden of proof in establishing that she was presently disabled from performing her regular job as a result of a recurring work-related injury.[66] The Pennsylvania Commonwealth Court reversed the appeal board's decision granting this reinstatement of benefits. The testimony of the doctor at the hearing did not satisfy this burden.

---

[63] Parks v. W.C.A.B., 660 P.2d 382 (Cal. 1983).

[64] Holloway v. Madison-Grant United School Corp., 448 N.E.2d 27 (Ind. Ct. App. 1983).

[65] Davis v. Houston Indep. School Dist., 654 S.W.2d 818 (Tex. Civ. App. 1983).

A workmen's compensation claimant sought reimbursement for rehabilitation expenses incurred. The New Mexico Court of Appeal affirmed the dismissal of the claim because the worker failed to establish the need for rehabilitation as required by statute.[67]

A school district employee, a clerk-typist, en route by car from one district building to another, got lost, stopped to ask directions, and while stopped was assaulted. The thief reached in through an open window and ripped a gold necklace off her neck. Approximately an hour after the assault the employee died of a heart attack. A Florida District Court of Appeal held that the dead employee qualified for worker's compensation benefits.[68] An assault can constitute an accident within the meaning of the statute. And expert testimony established the causal connection between the accident and the heart attack. It is not required to be shown that the accident caused other physical injuries which, in turn, caused the heart attack. It is enough if there is competent substantial evidence to support the proposition that the heart attack is causally connected to the accident.

Compensation was denied to a district guidance counselor who was injured while on the way home from an evening football game for which he had been paid as a ticket seller. The circumstances did not satisfy the special errands or missions exception to the general rule that injuries that occur while going and coming from work are not compensable.[69]

A CETA worker fell from the roof of a school where he was working during the summer. The Ohio Supreme Court held that the employee had an employer-employee relationship with the school district and he was thus barred from bringing a negligence action against the school superintendent because of immunity from suit provided by workers' compensation statutes.[70]

5.5 ASSAULT AND BATTERY

Assault and battery are usually talked about together although they actually are two separate intentional torts. Battery is an intentional and unpermitted touching of another while assault is an act of putting another in fear of the touching.[71]

---

[66] Bentworth School Dist. v. Workmen's Compensation Appeal Bd., 459 A.2d 906 (Pa. Commw. Ct. 1983).

[67] Garcia v. Albuquerque Pub. Schools, 663 P.2d 1198 (N.M. Ct. App. 1983).

[68] Popiel v. Broward Cty. School Bd., 432 So. 2d 1374 (Fla. Dist. Ct. App. 1983).

[69] Gray v. Dade Cty. School Bd., 433 So. 2d 1009 (Fla. Dist. Ct. App. 1983).

[70] Vandriest v. Midlem, 425 N.E.2d 321 (Ohio 1983).

An Ohio Court of Appeals reversed the trial court conviction of an assistant superintendent for assault. The trial court made two errors. First, it placed the statutory authority allowing reasonable corporal punishment as an affirmative defense. The appellate court held that the state, to convict a teacher or administrator for assault, must prove not only the elements of assault contained in the statute but must also prove beyond a reasonable doubt that the corporal punishment inflicted upon the pupil was unreasonable and was not reasonably necessary to preserve discipline.[72] Second, the conviction of the school administrator for assault of the student was against the manifest weight of evidence.

5.6 DEFAMATION

Defamation is the general term that covers the specific torts of libel and slander; libel applies in general to the written word while slander applies generally to the spoken word. The torts cover words that, in the eyes of the community, invade the person's reputation and good name.[73]

The prima facie case of defamation consists of five elements: 1) defamatory words, 2) publication, 3) falsity, 4) malice, actual or implied, and 5) resulting injury.[74]

A superintendent brought a defamation action against a school board member for comments quoted in a newspaper article that allegedly accused the superintendent of committing a crime and thereby harming him in his profession. The pertinent quote in the article said, "whatever legal ramifications result from that investigation—which could range from the superintendent losing his certification to criminal penalties—is [sic] up to the state's attorney. I think that the public will demand changes once all the information is brought out by the state's attorney." The central issue in this decision was whether the innocent-construction rule could be applied to the board member's statement. Under the innocent-construction rule, if the statement can reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than plaintiff, then the statement is not actionable as a matter of law. The Illinois Appellate Court held that the innocent-construction rule applied—the words could reasonably be interpreted as not accusing the superintendent of a crime and the statement could be read as not imputing any unfitness or lack of ability on the superintendent—and dismissed the complaint.[75]

---

[71] *See* Prosser, *supra* note 1, § 9, at 34-41.

[72] State v. Hoover, 450 N.E.2d 710 (Ohio Ct. App. 1982).

[73] *See* Prosser, *supra* note 1, for a more detailed description.

[74] For elaboration of the prima facie case in an educational context, *see* Schwartz, *Defamation: A Worry for All Seasons*, 10 West's Educ. L. Rep. 909 (1983) and Thurston, Ory, Mayberry and Braskamp, *Legal and Professional Standards in Program Evaluation*, 6 Educational Evaluation & Policy Analysis 15 (Spring 1984).

Dissatisfied parents petitioned the board of education to dismiss a teacher they thought unfit, accusing the teacher of such improprieties as striking a student, insulting various parents, and threatening bodily harm to a female parent. This petition was also given to a newspaper reporter. In determining the potential liability of the parents for defaming the teacher, the court analyzed the applicability of an absolute or qualified privilege. Because of the importance of keeping lines of communication open between parents and the school, the court held that the petition to the board of education was absolutely privileged and, therefore, immune from suit. The court refused to rule on what level of privilege existed for making the petition available to the newspaper reporter since insufficient facts were available. The absolute privilege is lost if the petition was maliciously instituted. And the existence of a qualified privilege depends upon the making of a bona fide communication in which the makers have a legal, moral, or social duty to speak and the communication is made to a person having a corresponding interest or duty. There was insufficient factual evidence about the reporter's mutuality of interest in the subject matter of the petition.[76]

A former San Diego school board member brought defamation action against her successful challenger, certain of challenger's campaign workers, local newspapers, and reporters. Where, as in the case, the plaintiff is a public figure the plaintiff must show with clear and convincing evidence that defamation was done with actual malice. This requires showing the disseminator of the falsehood either knew it to be untrue or made the publication with reckless disregard for the truth. The appellate court affirmed the trial court in dismissing many of the causes of action and holding that no special damages—loss of income and employment benefits—were available as a remedy because of the elections defeat. The appellate court held that there were triable issues of fact that the charges of "blackmail" and other criminal conduct and breaches of trust provided bases for defamation because they could reasonably be read as charging a public official with a crime.[77] In addition, there were sufficient facts to warrant going to trial on the question of actual malice. The appellate court also held that there were triable issues of fact on the statements that the previous school board member appeared at union rallies and supported union demands. This is potentially defamatory per se since the encouragement of an illegal strike would be improper from a board member. And again, there were sufficient facts to raise the possibility that these statements were reported with knowledge of falseness, and therefore that actual malice existed. A number of other claims were dismissed.

---

[75] Cartwright v. Garrison, 447 N.E.2d 446 (Ill. App. Ct. 1983).

[76] Weissman v. Mogol, 462 N.Y.S.2d 383 (N.Y. App. Div. 1983).

[77] Fisher v. Larsen, 188 Cal. Rptr. 216 (Cal. Ct. App. 1982).

The Florida appellate court upheld an award of compensatory damages for a teacher against a parent who had made libelous statements about the teacher before the board of education. Although the parent enjoys a qualified privilege to make statements imputing inefficiency or lack of competency to a public school teacher when such statements are made within the established procedures of the public school system, the privilege is lost if the statements are untrue and made with actual malice. There was sufficient evidence to support the trial court finding that the statements were made with malice.[78]

A federal district court, faced with a pendent state libel claim, denied a motion to dismiss the defamation action.[79] The action was brought by a white principal of a largely black Chicago elementary school who claimed that ten members of the school advisory board harassed her, and that certain statements made to the Chicago Board of Education and elsewhere defamed her. The court, with little elaboration, held that the defendants neither enjoyed an absolute privilege because of the statements being made to the board of education nor a qualified privilege. The principal was not a public figure, and therefore the actual malice standard is not appropriate. The court concluded by saying that the allegations were sufficient to state a cause of action for libel per se because the allegedly defamatory remarks could be found at trial to be directed at her "inability to perform or want of integrity in the discharge of duties of office or employment."[80]

5.7 TORTIOUS INTERFERENCE WITH A CONTRACT

In the case where a white elementary principal claimed harassment by a group of black parents trying to force her from her principalship, the federal district court refused to dismiss an action by the principal for tortious interference of contract. The five elements of the tort of inducing breach of contract are 1) an existing contract between the plaintiff and a third party, 2) defendant's knowledge of this contract, 3) an intentional unjustified inducement to breach the contract, 4) a subsequent breach by a third party, and 5) resulting damage to the plaintiff. The court was willing to view the principal's reassignment to another school following her medical leave of absence as satisfying the breach of contract element. This, combined with an interpretation of the pleadings in a light most favorable to the plaintiff, persuaded the court to deny the motion to dismiss the tortious interference of contract claim.[81]

---

[78] Nodar v. Galbreath, 429 So. 2d 715 (Fla. Dist. Ct. App. 1983).
[79] Stevens v. Tillman, 568 F. Supp. 289 (E.D. Ill. 1983).
[80] *Id.*

5.8 PRODUCTS LIABILITY

A New Jersey board of education had constructed four school buildings between 1959 and 1964. Because acoustical plaster containing asbestos was used in the construction, and because asbestos was subsequently determined to pose health hazards, the board had to remove the ceiling plaster at a cost of about $1 million. The board sought to recover the cost of removal and replacement under theories of strict liability in tort, breach of warranty, and negligence. It also sought punitive damages. In this case the defendant, United States Gypsum Company, sought summary judgment dismissing all of the claims. The federal district court granted summary judgment only on the warranty claims, which were barred by the four-year statute of limitations. The district court held that the strict liability standards of product liability apply in New Jersey. Therefore, where, as here, the board of education had no knowledge of the potential dangers of asbestos in acoustical plaster used in the ceilings of the four schools, the manufacturer who put the asbestos in the market place and profited thereby is liable for the cost of damages. There is liability even though the manufacturer did not have any knowledge of the danger of its product. And the liability continues so long as the plaintiff acts with due diligence in prosecuting the action.

In addition, the federal district court refused to apply the New Jersey ten-year limitation statute arising out of defective design of improvements to realty where the asbestos was not designed specifically for use in the schools and the supplier was not an architect involved in construction nor a contractor participating in construction.

Finally, the court refused to bar punitive damages. Punitive damages are available in New Jersey in an economic loss products liability suit if the district can establish the requisite egregious conduct on the part of the defendant.[82]

---

[81] Catalano v. Pechous, 387 N.E.2d 714, 721 (Ill. App. Ct. 1978).

[82] Cinnaminson Twp. Bd. of Educ. v. United States Gyprum Co., 552 F. Supp. 855 (D.N.J. 1982).

5.9 INVASION OF RIGHT TO PRIVACY

A story about drug use in the junior high school appeared in the local newspaper. Accompanying the story were several photographs describing "apparent drug transactions" between students, and although the photos were processed to make the student unrecognizable one student alleged that she was recognized by schoolmates, teachers, and parents. She filed suit claiming the photograph was used without her consent and that its use was an invasion of privacy, both because it placed her in a false light and because the photogrpahs conveyed an extraorindary commercial benefit to the publishers. The Oregon Court of Appeals affirmed the jury verdict dismissing the false light claim because testimony at trial that the girl was a drug user undermined the essential element of a false light invasion of privacy claim that the publicity that placed her in a false light was false. The court also affirmed the summary judgment dismissing the commercial benefit claim premised on Restatement (Second) of Torts section 652c (1976):

> One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

There was no evidence that the article, which otherwise discussed a timely subject of interest in the community, was intended to have an extraordinary commercial benefit to publishers.[83]

A sixteen-year-old with a history of psychological problems transferred from a school in one state to a school in another state. To transfer to the receiving school she needed records from the first school, and the parents signed a form authorizing release only of the academic records. The psychological records and complete history of the student were mistakenly fowarded; after the girl had some trouble relating to other students in the second school the parents brought a cause of action against the first school claiming invasion of privacy. This particular strand of invasion of privacy, sometimes known as the tortious disclosure of private facts, involves two critical elements. First, there must be a publicity of a highly objectionable kind given to some private information about the person. It is irrelevant that the information may be correct and thereby bar any action for defamation. Second, the matter made public must be objectionable and offensive to a reasonable person of ordinary sensibilities. In this case the Maryland Court of Appeals dismissed the invasion of privacy claim because it could find no reasonable publicity nor any thing that unreasonably placed the transfer student in an unreasonable light to the public.[84] Evidence indicated that the records could be sent without any parental authority, and that the records were seen only by the principal and the chief guidance counselor of the second school. No evidence was offered that showed that unwarranted publicity was given to the information contained in the records.

---

[83] Martinez v. Democrat-Herald Publishing Co., 669 P.2d 818 (Or. Ct. App. 1983).

5.10 CONSTITUTIONAL TORTS

In a number of decisions over the past several years the Supreme Court has refined the area of constitutional torts where individuals,[85] absent good faith immunity, and municipalities are liable for depriving persons of constitutional[86] or federal stautory[87] claims. Punitive damages are not available against a municipality[88] under 42 U.S.C. § 1983.[89] The United States Supreme Court held in *Smith v. Wade*[90] that punitive damages are available against individuals. The Supreme Court articulated the following standard.

> We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or interest, or when it involves reckless or callous indifference to the federally protected rights of others . . . . [T]his threshold applies even when the underlying standard of liability for compensatory damages is one of recklessness.[91]

Litigation continues to be heavy in the constitutional tort area with considerable attention given to the boundaries of a section 1983 action.

A learning disabled child and the father sued a public school district and the state department of education under a number of theories for inappropriate placement of the child. The federal district court had to decide, among other things, the appropriateness of using section 1983 as a basis for this type of claim. The court used the four factors described in *Pennhurst*[92] as a refinement of *Maine v. Thibotout*[93] in determining what federal statues are actionable under section 1983: whether a private cause of action is available; whether the statute on which suit is desired provides a detailed statutory and administrative and judicial scheme for its enforcement; whether the statute creates new rights; and whether the statute provides a damage remedy. Considering these factors the court concluded that plaintiffs may not bring an action under section 1983 to vindicate rights created by the Education for All Handicapped Children Act.[94] Yet, because the Rehabilitation Act does not have a detailed administrative scheme and because money damages are available the court concluded that the statute was not intended as the exclusive means of asserting and protecting rights secured by the act; therefore, suit may be brought to vindicate the rights established by the Rehabilitation Act under section 1983.[95]

---

[84] Klipa v. Board of Educ. of Anne Arundel Cty., 460 A.2d 601 (Md. 1983).

[85] Wood v. Strickland, 420 U.S. 308 (1975). This good faith, qualified immunity was extended to the Commissioner of Education and other state officials in Board of Educ. v. Ambach, 458 N.Y.S.2d 680 (N.Y. App. Div. 1982).

[86] Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978). Owen v. City of Independence, 445 U.S. 622 (1980) extends this liability to municipalities and denies immunity to the governing body even if the action was taken in good faith.

[87] Maine v. Thibotout, 448 U.S. 1 (1980).

[88] City of Newport v. Fact Concerts, 101 S. Ct. 2748 (1981).

[89] For a more detailed description of the development of the constitutional tort, *see* THE YEARBOOK OF SCHOOL LAW 1980 (P. Piele ed.) at 260-67, THE YEARBOOK OF SCHOOL LAW 1981 (P. Piele ed.) at 226-29, and THE YEARBOOK OF SCHOOL LAW 1982 (P. Piele ed.) at 205-8. *See also* Valente, *Federal Tort Liability for Civil Rights Deprivations in Public Schools*, 5 WEST'S EDUC. L. REP. 701 (1982).

[90] 103 S. Ct. 1625 (1983).

[91] *Id.* at 1640.

In a decision with much less analysis a federal district court in Wisconsin held that section 1983 is available as a remedy for violations of those provisions of the Education Consolidation and Improvement Act of 1981 that are preconditions to federal funding of state migrant education programs.[96]

A Wisconsin state court of appeals dismissed a section 1983 claim against a school district for a secretary's failure to warn the principal about a phone call alerting them to a man lurking around the school who is believed to have subsequently strangled a second grader. This was held insufficient for a Civil Rights Act claim for two reasons: first, although the secretary's action could be described as state action, the action of the murderer was not state action; second, the availability of a common law negligence action to pursue a remedy means that due process is available, and therefore there is no violation of the fourteenth amendment.[97]

The Seventh Circuit Court of Appeals affirmed a district court decision that the nonrenewal of an athletic director's position after the first year violated the athletic director's fourteenth amendment due process. Because there was an oral contract for two years of employment the nonrenewal amounted to a deprivation of property, and therefore the court held that the nonrenewal procedural safeguards to satisfy the fourteenth amendment due process requirements.[98] In a per curiam decision the Supreme Court affirmed this decision by an equally divided court.[99]

---

[92] Pennhurst State School & Hosp. v. Holderman, 451 U.S. 1 (1981).

[93] 448 U.S. 1 (1980).

[94] A number of federal district court and circuit court of appeals decisions have held that neither damages nor attorneys' fees are available pursuant to section 1983 for alleged violations of the Education for All Handicapped Children Act. *See, e.g.*, Doe v. Koger, 710 F.2d 1209 (7th Cir. 1983); Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348 (5th Cir. 1983); Smith v. Cumberland School Comm., 703 F.2d 4 (1st Cir. 1983); Calhoun v. Illinois State Bd. of Educ., 550 F. Supp. 796 (N.D. Ill. 1982); Smrcka v. Ambach, 555 F. Supp. 1227 (E.D.N.Y. 1983).

[95] Sanders v. Marquette Pub. Schools, 561 F. Supp. 1361 (N.D. Mich. 1983).

[96] Valdez v. Grover, 563 F. Supp. 129 (W.D. Wis. 1983).

[97] Enright v. Board of School Dirs., 338 N.W.2d 114 (Wis. Ct. App. 1983).

Beyond this there are two recent cases that suggest the difficulties courts are having in drawing distinctions between traditional torts and constitutional torts.

A high school student was injured in a shops accident when his hand was badly cut by a table saw that did not have a guard. Because the action was barred in traditional tort action in Texas by sovereign immunity, this action was filed in federal court under 42 U.S.C. § 1983. Responding to several motions for summary judgment by the school district and shops teacher to dismiss the case the federal district court held as follows: 1) a torts claim was a viable basis for a section 1983 action where, as here, no remedy exists in state law and where, following the criteria of *Parratt v. Taylor*,[100] there was state action, an injury involving a liberty right, and a deprivation; 2) the dismissal of the state negligence action because of immunity did not bar this federal action under res judicata because there is no compelling policy consideration such as promotion of judicial economy or risk of double recovery that is substantially violated; and 3) the eleventh amendment does not provide immunity to the school district since it acts only to bar those suits against bodies that are only an agency or arm of the state.[101] The federal district court did hold that the shop teacher was immune from liability for damages in his individual capacity.

In a second case a student alleged that she had been deprived of her fourteenth amendment substantive due process right to be free from physical intrusion upon her person when her teacher disciplined her by piercing her upper arm with a straight pin. The federal district court dismissed the action because the student had not sufficiently demonstrated in her pleadings that the use of the pin had been motivated tto deprive her of some independent constitutional right. Simply alleging deprivation of some right that inheres in “substantive due process’ was insufficient.[102] The frustration Judge Warriner felt in attempting to distinguish common law and constitutional torts merits a lengthy quote from the opinion.

---

[98] Board of Educ. v. Vail, 706 F.2d 1435 (7th Cir. 1983).

[99] Board of Educ. v. Vail, 52 U.S.L.W. 4483 (April 23, 1984).

[100] 451 U.S. 527 (1981).

[101] Flores v. Edinburg Consol. Indep. School Dist., 554 F. Supp. 974 (S.D. Texas 1983). For commentary about this case, *see* Frels & Horner, *The Negligent Deprivation of Liberty Interests Under 42 U.S.C. Section 1983*, 14 WESTS EDUC. L. REP. 615 (1983).

[102] Brooks v. School Bd. of City of Richmond, 569 F. Supp. 1534 (E.D. Va. 1983).

> Absent some such dividing line between common law tort and constitutional tort, we are left to a two-step analysis that does little to divide one tort from the other. We determine whether, first, a State employee is the defendant and, say the cases, we can only determine shock, vel non, after a trial. Only after a trial in an assault and battery case can we determine whether we had jurisdiction to try the case. If we are not shocked we didn't have jurisdiction. That is a heck of a way to run a Constitution.
>
> The lines that must legitimately and constitutionally be drawn between constitutional torts and common law torts are complicated and entangled. Unless federal courts are to become a special tribunal for the trial of tort claims where the defendant is a State employee, there must be some simplification and disentanglement. Lawyers and judges should be able to spot the difference with some degree of confidence. There should be some order and sense in the law. In hopes that it makes sense we shall continue to follow our understanding of *Screws*[103] and demand that each such tort, before it becomes actionable under § 1983, be motivated by a further desire to deprive the plaintiff of independently protected rights.[104]

5.10a Student-Initiated Cases

Two federal district court decisions dismissed student rights claims under section 1983 because there were no constitutional violations.[105]

5.10b Employee-Initiated Cases

A former employee sued the superintendent and the board of education alleging that she had been dismissed as a public school cafeteria worker solely because her son attended a private academy rather than the local public school district. The Fifth Circuit Court of Appeals held that the woman's school selection decision was within the penumbra of familial privacy rights guaranteed by the Constitution. The matter was remanded to the district court to examine the facts in light of the balance necessary between this parental right and the right of the state in promoting efficiency in its educational services. In addition, the district court must also determine whether the protected activity played a substantial part in the board's discharge decision.[106]

---

[103] Screws v. United States, 325 U.S. 91 (1944).

[104] Brooks, *supra* note 102 at 1539.

[105] Rhodus v. Dumiller, 552 F. Supp. 415 (M.D. La. 1982); Tarter v. Raybuck, 556 F. Supp. 625 (N.D. Ohio 1983).

A coach brought a section 1983 action for punitive and compensatory damages for alleged violation of his first amendment free speech rights when he was relieved of his coaching duties as a disciplinary action based upon his writing and sending of a letter to the board of education. The superintendent countered that the discipline was meted out because of the violation of the district's "channels rules," which required district employees to channel their remarks to the board through the superintendent. The federal district court held that the letter to the board was constitutionally protected and left it for the jury at a subsequent trial to decide whether this letter was a substantial factor in the disciplinary action of removing him from coaching. Depending on the decision of the jury on the extent of this substantive first amendment matter the federal district court held that 1) the district is responsible for the actions of the suprintendent because he was acting pursuant to district policy; 2) the district is not entitled to immunity; and 3) because the "channel's rule" was an impermissible prior restraint on first amendment rights the superintendent does not enjoy good faith immunity if the jury finds that the letter to the board was a substantial factor in the coach's discipline. Finally, the district court held that the coach is entitled to prove injury to reputation and, therefore, recover compensable damages, damages for mental and emotional distress, and punitive damages.[107]

A teacher's claim that his dismissal was improperly motivated by race was not barred from consideration in federal court under section 1983 even though the teacher had prusued state law remedies and ultimately lost. There was no problem with the statute of limitations and the state decision by the state board of education did not have the effect of collateral estoppel on this action because of the questionable procedures used in the state board reversal of the original hearing examiner's decision.[108]

In a North Dakota case a federal district court refused to dismiss a section 1983 action brought by a dismissed superintendent on a due process claim.[109]

---

[106] Brantley v. Surles, 718 F.2d 1354 (5th Cir. 1983).

[107] Anderson v. Central Point School Dist. No. 6, 554 F. Supp. 600 (D. Or. 1982).

[108] Griffen v. Big Spring Indep. School Dist., 706 F.2d 645 (5th Cir. 1983).

[109] Okeson v. Tolley School Dist. No. 25, 570 F. Supp. 408 (D.N.D. 1983).

A number of claims were dismissed for not having demonstrated a violation of a constitutional right.[110]

---

[110] *See, e.g.*, White v. South Park Indep. School Dist., 693 F.2d 1163 (5th Cir. 1982) (teacher dismissal did not violate his free speech and due process rights); Gordon v. Warren Consol. Bd. of Educ., 706 F.2d 778 (6th Cir. 1983) (placement of undercover woman in several classes to observe illegal drug trafficking did not violate any substantive rights of teachers or students in classes she observed); Reichert v. Draud, 701 F.2d 1168 (6th Cir. 1983) (changing of teaching schedule did not violate teacher's first amendment rights); Renfroe v. Kirkpatrick, 549 F. Supp. 1368 (N.D. Ala. 1982) (alleged violation of free speech was actually done for legitimate employment reasons); Barry v. Blue Springs R-IX School Dist., 557 F. Supp. 249 (W.D. Mo. 1983) (termination of school district dietitian pursuant to bona fide financial crisis did not deprive her of constitutional due process); Bryant v. St. Helena Parish School Bd., 561 F. Supp. 239 (M.D. La. 1983) (no substantive violation of either free speech or due process in the teacher dismissal); New Castle Cty. Voc.-Tech. Educ. Ass'n v. Board of Educ., New Castle Cty. Voc.-Tech. School Dist., 569 F. Supp. 1482 (D. Del. 1983) (claims that board's failure to pay yearly salary step increases deprived teachers of first amendment freedom of association and fourteenth amendment due process rights were dismissed).

6

FINANCE

Richard A. Rossmiller

Introduction 6.0
Public Funds for Private Schools 6.1
  Auxiliary Services, Textbooks, and Instructional Materials 6.1a
  Transportation 6.1b
Sources and Allocation of Public School Funds 6.2
  State School Finance Programs 6.2a
  Funds for Special Education 6.2b
  Federal Funds for Education 6.2c
  School Fees 6.2d
School Tax Issues 6.3
  Power to Tax 6.3a
  Relationship of School Districts to Other Government Units 6.3b
  Uses of Revenue 6.3c

6.0 INTRODUCTION

Cases dealing with issues such as tuition tax credits, reimbursement by states of misapplied Title I funds, and tuition requirements for nonresident students were decided by the United States Supreme Court during the period covered by this yearbook. Cases involving the constitutionality of state school support programs were litigated in Maryland and Arkansas with opposite results. Cases questioning the legality of fees assessed students were decided in California and New Jersey and decisions were handed down in an array of cases involving the legality of various school taxes and expenditures.

6.1 PUBLIC FUNDS FOR PRIVATE SCHOOLS

The United States Supreme Court, in a 5-4 decision, upheld the constitutionality of a Minnesota law that allowed taxpayers, in computing their state income tax,[1] to deduct from their gross income expenses they incurred in providing tuition, textbooks, and transportation for their children attending a public or private elementary or secondary school. The statute in question was originally enacted in 1955 with revisions in 1976 and 1978. The deduction was limited to $500 per dependent in grades K-6 and $700 per dependent in grades 7-12. The plaintiffs claimed the statute violated the first amendment's establishment clause by providing financial support to sectarian institutions. The federal district court held the statute did not violate the establishment clause.[2] The United States court of appeals affirmed.[3]

---

[1] Mueller v. Allen, 103 S. Ct. 3062 (1983).

The United States Supreme Court applied the three-part test it had established in *Lemon v. Kurtzman*.[4] With regard to whether or not the statute served a secular purpose, the Court stated, "A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable."[5] The Court then turned to the question of whether the primary effect of the statute either advanced or inhibited religion and found that it did not. The Court noted that the deduction in question was but one of many deductions available to Minnesota taxpayers. The fact that the deduction was available to all parents whether their children attended public or private schools weighed heavily in the Court's decision. The Court commented:

> It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children. It is also true, however, that under Minnesota's arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children . . . . Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no "imprimatur of State approval," . . . can be deemed to have been conferred on any particular religion, or on religion generally.[6]

The plaintiffs argued that, although the statute appeared neutral on its face, in operation the benefits under the statute accrued primarily to religious institutions. They claimed that 96% of the children in private schools in Minnesota during 1978-79 attended religiously affiliated institutions and, thus, the bulk of deductions taken under the statute would be claimed by parents of children who attend sectarian schools. The Court, however, gave little consideration to the plantiffs' contentions, stating, "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."[7]

---

[2] Mueller v. Allen, 514 F. Supp. 998 (D. Minn. 1981).

[3] Mueller v. Allen, 676 F.2d 1195 (8th Cir. 1982).

[4] 403 U.S. 602 (1971).

[5] Mueller, *supra* note 1, at 3066, 3067.

[6] *Id.* at 3069.

Turning to the third aspect of the three-prong test, the Court concluded that the statute did not produce an excessive entanglement of the state in religion. The only determination required of state officials was whether specific textbooks served a secular or sectarian purpose and the Court found such decisions not to differ substantially from the types of decisions it had approved in earlier opinions.[8]

In view of the divided decision (5-4), it is worth noting that the minority opinion concluded that any tax benefit that subsidizes tuition payments to sectarian schools is prohibited by the establishment clause of the first amendment. The minority noted, "Because Minnesota, like every other State, is committed to providing free public education, tax assistance for tuition payments inevitably redounds to the benefit of nonpublic, sectarian schools and parents who send their children to those schools."[9]

6.1a Auxiliary Services, Textbooks, and Instructional Materials

The constitutionality of a South Dakota statute providing for the loan of textbooks without charge to students in both public and private schools was contested.[10] It was alleged the statutes in question violated both the establishment clause of the first amendment and the South Dakota Constitution. Plaintiffs claimed the statutes had the primary affect of advancing religion by providing public aid to church-related schools and fostered excessive involvement between the state and the church in religious matters. The federal district court had granted summary judgment to the appellees. The court of appeals found the Supreme Court's decisions in *Meek*[11] and *Allen*[12] to be controlling and found that, as written, the statutes did not violate the establishment clause.

Plaintiffs also claimed that the way in which school districts administered the statutes violated the establishment clause. The court found the record in the case insufficient to determine whether or not the practices followed by school districts in administering the textbook loan program fell within the constitutional proscriptions established by the Supreme Court in *Meek* and in *Wolman*.[13] The case was remanded to the district court for consideration of this issue.

---

[7] *Id.* at 3070.

[8] Board of Educ. v. Allen, 382 U.S. 236 (1968).

[9] Mueller, *supra* note 1, at 3075.

[10] Elbe v. Yankton Indep. School Dist. No. 1, 714 F.2d 848 (8th Cir. 1983).

[11] Meek v. Pittenger, 421 U.S. 349 (1975).

[12] Board of Educ., *supra* note 8.

6.1b Transportation

Litigation with regard to the constitutionality of Rhode Island laws providing for the transportation of children attending nonpublic schools reached the Court of Appeals for the First Circuit.[14] This law divided the state into five regions and required each local school committee to provide a resident student with bus transportation to the school he or she attended, whether public or private, as long as the school was within the region in which the pupil resided. A variance procedures was provided, allowing students to attend a school outside the region in which they resided if the commissioner of education found that there was no similar school within the region and that the school the pupil attended was within fifteen miles of the city or town in which the pupil resided. Plaintiffs contended the statutes violated the estabishment clause of the first amendment. The federal district court held the statutes unconstitutional because they provided sectarian school children with greater opportunities than were available to their public school counterparts and because the administrative require ments of the statute constituted an excessive entanglement of church and state.[15]

The court of appeals affirmed the district court's decision with regard to the excessive entangelement analysis. However, it held the invalid portion of the statute was severable from the otherwise valid portions because it was only a minor part of the statutory scheme. The court of appeals held the remaining portions of the law constitutional. The court ruled the statute served a secular purpose and did not have a primary effect of advancing or inhibiting religion. It found that only the portion of the statute requiring the commissioner of education to determine whether the sectarian school a student wished to attend was "similar" to a school located within the region involved excessive entanglement because of the possibility that the commissioner, "would have to engage in educational and perhaps even theological hair-splitting to compare sectarian schools, especially where the schools may represent competing orders or approaches of a single faith ....

---

[13] Wolamn v. Walter, 433 U.S. 229 (1977).

[14] Members of Jamestown School Comm. v. Schmidt, 699 F.2d 1 (1st Cir. 1983).

[15] Members of Jamestown School Comm. v. Schmidt, 525 F. Supp. 1045 (D.R.I. 1981). *See* THE YEARBOOK OF SCHOOL LAW 1982 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1982] at 143.

Moreover, even such seemingly secular items as library or drama program equality may pose religious issues, for one man's masterpiece may be another's heresy."[16] As noted, this portion of the law was ruled to be severable from the valid portions.

Petitioners in a West Virginia case sought to require a county board of education to provide school bus transportation for their children who attended parochial schools.[17] West Virginia statutes authorized a local school board to provide transportation at public expense for all children of school age living more than two miles from school by the nearest available road. The Kanawha County Board of Education provided either a monetary stipend to parents for the transportation of parochial students or permitted them to ride school buses on established public school bus routes. The Supreme Court of Appeals of West Virginia upheld the constitutionality of the statute, ruling that the equal protection clause of the fourteenth amendment was not violated by treating public and nonpublic school children differently in the allocation of state aid and other educational resources. It also held that paying parents full monetary stipends for transportation of parochial school children, together with permitting them to ride school buses on regularly scheduled bus routes, constituted compliance with the statute. The court found the stipend being paid parents of parochial school students was inadequate and directed that it be increased to an amount needed to provide adequate transportation.

New York statutes require that parents who wish a school district to provide students with transportation to a nonpublic school must submit an application before April 1 of the preceding school year. In a New York case the parents failed to apply for transportation to a nonpublic school for their daughter until late May and their request was denied by the board of education.[18] An appeal was taken to the New York Commissioner of Education who directed the school board to provide the transportation requested. The school board appealed the commissioner's decision and the court ruled in favor of the school board, finding the commissioner had failed to distinguish adequately between a prior case in which the board had granted a late request for transportation and the present case. The court found the two cases were not "in like circumstances" and annulled the commissioner's determination.

---

[16] Members of Jamestown School Comm., *supra* note 14.

[17] Janasiewicz v. Board of Educ. of Cty. of Kanawha, 299 S.E.2d 34 (W. Va. 1982).

[18] Board of Educ., Hauppauge Union Free School Dist. v. Ambach, 462 N.Y.S.2d 294 (N.Y. App. Div. 1983).

6.2 SOURCES AND ALLOCATION OF PUBLIC SCHOOL FUNDS

6.2a State School Finance Programs

Two cases in which the constitutionality of state programs for financing elementary and secondary schools were at issue were decided during the period covered by this yearbook. The Court of Appeals of Maryland upheld the constitutionality of that state's system of financing public elementary and secondary schools.[10] Plaintiffs included boards of education of four of the state's least wealthy school districts, taxpayers, students, parents, and public officials. They claimed Maryland's school support program violated (1) the equal protection clause of the fourteenth amendment, (2) the equal protection guarantee of article 24 of the Maryland Declaration of Rights, and (3) section 1, article VIII of the Maryland Constitution, which directs the General Assemby to "establish throughout the State a thorough and efficient System of Free Public Schools; and [to] provide by taxation, or otherwise, for their maintenance." The plaintiffs alleged that a lack of school funds caused by the state's inadequate financing system made it impossible for them to meet their constitutional obligations under the equal protection guarantee or under the "thorough and efficient" clause of Maryland's constitution. The trial court ruled for the plaintiffs and the state appealed.

The Court of Appeals of Maryland conducted a detailed review of the history of the state's constitutional provisions concerning public education. The court found that the words "thorough and efficient," considered in historical context, are not the equivalent of "uniform." The court stated:

> Nor do these words impose upon the legislature any directive, in its establishment of the public school system, to so fund and operate it that the same amounts of money must be allocated and spent, per pupil, in every school district in Maryland. To conclude that a "thorough and efficient" system under [section] 1 means a full, complete and effective educational system throughout the State, as the trial judge held, is not to require a statewide system which provides more than a basic or adequate education to the State's children. The development of the statewide system under [section] 1 is a matter for legislative determination; at most, the legislature is commanded by [section] 1 to establish such a system, effective in all school districts, as will provide the State's youth with a basic public school education."[20]

---

19. Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d 758 (Md. 1983).
20. *Id.* at 776.

The court concluded:

> The record in this case demonstrates that Maryland has continuously undertaken to provide a thorough and efficient public school education to its children in compliance with Article VIII of the Maryland Constitution. That education need not be "equal" in the sense of mathematical uniformity, so long as efforts are made, as here, to minimize the impact of undeniable and inevitable demographic and environmental disadvantages on any given child. The current system, albeit imperfect, satisfies this test.[21]

The court next considered whether Maryland's system of public school finance violated either the equal protection clause of the fourteenth amendment or the equal treatment required by article 24 of the Maryland Declaration of Rights. The court agreed with the lower court's determination that Maryland's system did not violate the equal protection clause of the fourteenth amendment, noting that *Rodriguez*[22] is dispositive of the federal constitutional claim. With regard to the question of whether education is to be considered a fundamental right, the court reviewed decisions by other states involving similar issues and declined to "adopt the overly simplistic articulation of the fundamental rights test set forth in *Rodriguez*, i.e., that the existence of a fundamental right is determined by whether it is explicitly or implicitly guaranteed in the constitution."[23] Noting that Maryland's constitution either explicitly or implicitly guarantees rights that in no way could be considered fundamental, the court said:

> The right to an adequate education in Maryland is no more fundamental than the right to personal security, to fire protection, to welfare subsidies, to health care or like vital governmental services; accordingly, strict scrutiny is not the proper standard of review of the Maryland system of financing its public schools.[24]

It further noted that even if education were deemed a fundamental right, strict scrutiny would be appropriate only if a significant deprivation of that right occurred, and that no such deprivation had taken place in Maryland because no child was being denied adequate education.

The court found that Maryland's system of school finance satisfied the rational basis test, citing a legitimate state interest in promoting local control over education. The court stated:

---

[21] *Id.* at 780.

[22] San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[23] Hornbeck, *supra* note 19, at 786.

[24] *Id.*

> Although the General Assembly has never explicitly stated the object of its public school financing system, it is readily apparent that a primary objective is to establish and maintain a substantial measure of local control over the local public school systems—control exercised at the local level through influencing the determination of how much money should be raised for the local schools and how that money should be spent . . . . We think that the legislative objective of preserving and promoting local control over education is both a legitimate state interest and one to which the present financing system is reasonably related. Utilizing property taxation to partly finance Maryland schools is, therefore, rationally related to effectuating local control over public schools.[25]

Accordingly, the court held the state's system of financing public education to be constitutional.

The court commented on the central role of education in American society:

> [T]he issue in cases challenging the constitutionality of state public school finance systems is not whether education is of primary rank in the hierarchy of social values, for all recognize and support the principle that it is. Nor is the issue whether there are great disparities in educational opportunities among the State's school districts, for the existence of this state of affairs is widely recognized. Neither is the issue in this case whether it is desirable, as a matter of Maryland's social policy, that the same mathematically precise amount of money should be spent on each child's public school education, without regard to the wealth of the subdivision in which the students reside. The issue is whether anything in the constitution, state or federal, requires such a result or prohibits any county, regardless of wealth, from spending any more . . . . The expostulations of those urging alleviation of the existing disparities are properly to be addressed to the legislature for its consideration and weighing in the discharge of its continuing obligation to provide a thorough and efficient statewide system of free public schools. Otherwise stated, it is not within the power or province of members of the Judiciary to advance their own personal wishes or to implement their own personal notions of fairness under the guise of constitutional interpretation. The quantity and quality of educational opportunities to be made available to the State's public school children is a determination committed to the legislature or to the people of Maryland through adoption of an appropriate amendment to the State Constitution.[26]

---

[25] *Id.* at 788.
[26] *Id.* at 790.

The Supreme Court of Arkansas reached the opposite conclusion with regard to the constitutionality of the method of financing public schools employed in that state.[27] Eleven Arkansas school districts challenged the constitutionality of the state's system of financing public schools. The trial court ruled in favor of the plaintiffs and the state board of education appealed. The Supreme Court of Arkansas affirmed the trial court's decision and held the Arkansas system of financing public schools to be unconstitutional.

The Arkansas school finance system was similar, in broad outline, to the system employed in Maryland. However, in Arkansas a series of "hold-harmless" provisions over a thirty-year period had the effect of "freezing" the amount of state aid a district received. In addition, half of the funds remaining after the base aid was distributed were distributed on a flat grant per pupil basis. As a result, funds available for distribution under the equalization provisions of the Arkansas school finance plan constituted only 6.8% of the minimum foundation aid paid school districts in 1979-80. In addition, a school district was not eligible to receive state aid for vocational education until it had first established a program with local funds. Wealthier districts that could raise funds more easily obviously were advantaged by this requirement.

Plaintiffs claimed the state system violated the Arkansas Constitution's guarantee of equal protection (article II, sections 2, 3, and 18) and its requirement that the state provide a general, suitable and efficient system of education (article XIV, section 1). The plaintiffs contended that the great disparity in funds available to school districts throughout the state was due primarily to variations in the local tax base, that these variations were unrelated to the educational needs of a given district, that the existing state financing system failed to compensate for revenue disparities resulting from widely varying local tax bases, and that the state school aid system widened, rather than narrowed, the gap between property poor and property wealthy districts. The Arkansas Supreme Court noted that in most cases where similar state financing systems had been held unconstitutional, the court had judged the state constitution's equal protection clause to be applicable and to require that equal education opportunities be provided to students throughout the state. The court stated:

> There is no sound basis for holding the equal protection clause inapplicable to the facts in this case. The constitutional mandate for a general, suitable and efficient education in no way precludes us from applying the equal protection clause to

---

[27] DuPree v. Alma School Dist. No. 30, 651 S.W.2d 90 (Ark. 1983).

> the present financing system, in fact under the interpretations of such cases as *Robinson*, *supra*, that clause only reinforces the decision that the equal protection clause applies.
>
> We can find no legitimate state purpose to support the system. It bears no rational relationship to the educational needs of the individual districts, rather it is determined primarily by the tax base of each district. The trial court found the educational opportunity of the children in this state should not be controlled by the fortuitous circumstance of residence, and we can concur in that view. Such a system only promotes greater opportunities for the advantaged while diminishing the opportunities for the disadvantaged.[28]

The court noted that jurisdictions in which no equal protection violation had been found in a school finance system based on district wealth generally uphold the system of funding by finding a legitimate state purpose in maintaining local control. The court, however, was of the opinion that two fallacies in this reasoning existed. First, greater equalization among districts need not dictate a reduction in local control and, second, local control is a mere illusion if financial limitations prevent its exercise in poor districts. The court stated, "Consequently, even without deciding whether the right to a public education is fundamental, we can find no constitutional basis for the present system, as it has no rational bearing on the educational needs of the districts."[29]

A case decided in New Jersey involved an action by several local school districts challenging a formula adopted by the legislature to reduce minimum state aid to local school districts by $14 million for the fiscal year ending June 30, 1983.[30] The action reducing the appropriation for minimum aid also provided three criteria to be used in determining whether districts would receive aid. The plaintiffs argued that the criteria were discriminatory, arbitrary, and unreasonable. In rejecting their arguments, the court commented:

> Plaintiffs apparently believe that the *Robinson v. Cahill* decisions give their districts some sort of basic constitutional entitlement to minimum state aid. Almost the exact opposite is true. The *Robinson v. Cahill* decisions are essentially hostile to the concept of minimum aid to all districts because those decisions view minimum aid as being counterproductive to the goal of eliminating disparity in per pupil expenditures. Far from being constitutionally desirable, minimum aid is a highly suspect way of giving state aid to local school districts.[31]

---

[28] *Id.* at 93.

[29] *Id.*

[30] Fairfield Twp. Bd. of Educ. v. Kean, 457 A.2d 59 (N.J. Super. Ct. 1982).

[31] *Id.* at 63.

Thus, the court held that the formula violated neither equal protection guarantees nor state constitutional provisions requiring a "thorough and efficient" system of free public schools.

In Missouri, as in most other states, the statutory formula used in computing state funds to which school districts are entitled includes the market value of property located in the district. Several Missouri school districts brought action against the state tax commission and the state department of education contesting the procedure used in determining a district's percentage of assessed value to true value.[32] They claimed the tax commission was obligated to consider real property and personal property separately in determining the percent of true value at which property in each county is assessed. The tax commission determined the percent of true value based solely on samples of real property, claiming that a statistically valid ratio of personal property assessment would be impractical, if not impossible, to compute. The Supreme Court of Missouri ruled that real property and personal property must be considered separately. If the tax commission makes no study with reference to personal property, then it must advise the state department of education that the ratio it certifies applies only to real property. The state department of education, in applying ratios to allocate state school foundation funds among local school districts, should utilize personal property assessments reported for each school district to represent the equalized assessed valuation of personal property in the district.

In a California case, action was brought by a local school district to prevent the California Department of Education from "recapturing" over $3 million by deducting this amount from state payments due the district.[33] The dispute arose over "average daily attendance" funds received by the district for students enrolled in federally approved and supported vocational education classes. The facts in the case were quite complex, involving the Fullerton school district's entitlement to funds based on its amended claims for additional monies for preceding school years. The California Department of Education had paid the claims and then sought to recapture the money based on a 1977 amendment to the statute governing such payments. The trial court denied a writ of mandate to prevent the department of education's recapture of the money and the district appealed. The court of appeal reversed the trial court's decision, holding that evidence supported application of the doctrine of equitable estoppel against the department. Furthermore, the court ruled the Fullerton district was entitled to a writ of mandate under existing statutes, noting the general rule of construction that statutes are not to be given retroactive effect unless the intent of the legislature cannot be otherwise satisfied. The court ruled that a 1979 amendment to the statute at issue prohibited a future filing of an amendment claim but did not authorize retroactive recapture of funds already paid.

---

[32] State *ex rel.* School Dist. of City of Independence v. Jones, 653 S.W.2d 178 (Mo. 1983).

[33] Fullerton Union High School Dist. v. Riles, 188 Cal. Rptr. 897 (Cal. Ct. App. 1983).

A case decided in Massachusetts involved an appeal by a town from a trial court judgment declaring the town was entitled to receive reimbursement from the state for only 50% of the cost of construction of its senior high school rather than 65%.[34] The state provided reimbursement for school construction under a statute originally enacted in 1948 and subsequently amended. One of the subsequent amendments provided a 65% rate of reimbursement (rather than 50%) for projects in depressed areas that were approved on or after January 1, 1971. The court of appeal found that the project in question had been approved on October 27, 1970, and affirmed the decision of the trial court.

The auditor general of Pennsylvania issued an audit of the financial affairs of the School District of Lancaster in which it found that a forfeiture in the amount of $18,266 would be required because the district had employed improperly certified teachers.[35] The district's petition for review was quashed because it had failed to follow proper procedures. The court pointed out that under the state's administrative agency law, the auditor's report was an adjudication from which an appeal may be taken. Since the district failed to challenge the audit report and its finding, it could not later complain when the state department of education complied with the mandate of the report.

The state treasurer of Idaho sought to require the legislature to reimburse the state's public school endowment fund for losses incurred on individual security trades.[36] The legislature enacted a statute providing for offsetting capital gains against capital losses of the public school endowment fund at the end of a four-year accounting period. The treasurer claimed the statute violated article IX, section 3 of the Idaho Constitution, which requires the legislature to make good any losses suffered by the fund. The treasurer maintained that it was the legislature's responsibility to make good any losses sustained on individual transactions and therefore offsetting losses against gains was impermissible. The Supreme Court of Idaho rejected this contention, holding that permitting the offsetting of capital gains against capital losses at the end of a four-year accounting period accorded with the constitutional mandate.

---

[34] Town of Burlington v. Board of Educ., 448 N.E.2d 398 (Mass. App. Ct. 1983).

[35] School Dist. of Lancaster v. Commonwealth Dep't of Educ., 458 A.2d 1024 (Pa. Commw. Ct. 1983).

[36] State *ex rel.* Moon v. State Bd. of Examiners, 662 P.2d 221 (Idaho 1983).

An action was brought in New Jersey challenging the validity of a constitutional amendment limiting the state's right to claim riparian lands.[37] At the time of the American Revolution, title to tidal lands became vested in the state as successor to the English sovereign. The state constitution provided that proceeds from the sale of riparian lands were to be dedicated to the public schools. The state constitution was amended in November, 1981, to provide that lands that had not been tidal flowed at any time within forty years were to be deemed riparian lands and that unless the state had specifically asserted a claim to such lands, such a claim would be barred. The state was further required to define and assert any claims it had not yet asserted within one year of the passage of the amendment. Plaintiffs challenged the validity of the constitutional amendment on various grounds, including that it sought to convey without compensation state land that had been irrevocably dedicated as trust property and that it would violate the contract clause of the United States Constitution. The Superior Court of New Jersey rejected all arguments advanced by the plaintiffs, concluding that the constitutional amendment in question was in all respects valid.

6.2b Funds for Special Education

A case decided by the Court of Appeals for the Fifth Circuit involved a challenge to Mississippi's policy of refusing to formulate individual educational programs for handicapped children extending beyond 180 days per year.[38] The court reversed a district court decision and held that the state's policy violated mandates under the Education for All Handicapped Children Act (P.L. 94-142). The court noted that it was well established that lack of funds may not limit the availability of appropriate educational services to handicapped children more severely than it does to normal children.

The case decided by the Court of Appeals for the Second Circuit involved the question of whether or not the New York City Board of Education should be required to pay the cost of a student's placement in a private school.[39] The court affirmed a district court decision that the student was not entitled to public funding because he had not established that the private school was his "current" educational placement within the meaning of P.L. 94-142. Since the district had not previously agreed or been ordered to provide a private school placement, it was not required to pay for the student's education in a private school.

---

[37] 37. Dickinson v. Fund for Support of Free Pub. Schools, 454 A.2d 491 (N.J. Super. Ct. 1982).

[38] 38. Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983).

[39] 39. Zvi D. v. Ambach, 694 F.2d 904 (2d Cir. 1982). *See* YEARBOOK 1982 at 219-20.

6.2c Federal Funds for Education

New Jersey and Pennsylvania each received federal grants under Title I of the Elementary and Secondary Education Act of 1965 (ESEA). Federal auditors later determined that each state had misapplied a portion of the funds. The states requested review by the education appeal board, which modified the findings of the auditors but nevertheless assessed a deficiency against each state. When the orders became final each state petitioned for review. The cases were consolidated and the court of appeals held that the Department of Education did not have authority to issue the orders. The United States Supreme Court reversed the ruling of the court of appeals and remanded the case for further proceedings.[40] The Court ruled that the court of appeals had jurisdiction, that the secretary of education had authority to recover ESEA funds misused by a state under both the 1978 amendments and the pre-1978 version of the law, and that imposition of liability for misused funds did not interfere with state sovereignty in violation of the tenth amendment. Regarding the latter point, the Court stated:

> Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty. The State chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I . . . the State failed to fulfill those assurances, and it therefore became liable for the funds misused, as the grant specified.[41]

Representatives of kindergarten students whose families met the poverty-level income guidelines for receipt of free and reduced price lunches under the National School Lunch Act brought action against the school board of a Utah school district and its individual members, state and local educational officials, and the secretary of the United States Department of Agriculture, seeking to force the school district to provide them free or reduced-price lunches.[42] One group of kindergarten students attended classes in the morning and returned home for lunch; the second group attended class in the afternoon after lunch. The school district did not provide lunches to kindergarten students because they were not scheduled to be in attendance at school during the lunch hour. The plaintiffs argued that the kindergarten students met the only two statutory criteria for participation in the program, namely, family income level and school attendance. The trial court entered summary judgment against the plaintiffs and they appealed. The Court of Appeals for the Tenth Circuit affirmed the district court decision. It ruled that otherwise qualified half-day kindergarten students who were not scheduled to be in attendance at school when lunch was served as a result of bona fide curriculum considerations were not entitled to receive free or reduced-price lunches. The court rejected the argument that failing to provide them with free lunches violated the equal protection clause of the fourteenth amendment because the reasons for the classification were genuine, reasonable, and accomplished legitimate educational purposes.

---

[40] Bell v. New Jersey and Pennsylvania, 103 S. Ct. 2187 (1983).

[41] *Id.* at 2197.

Further action occurred in a case involving regulations adopted under Title IX, 20 U.S.C. section 1682.[43] A previous decision by the Fifth Circuit Court of Appeals had been vacated by the United States Supreme Court and remanded for further consideration. The court of appeals determined that the Department of Education could not raise for the first time on an appeal the defense that it had not completed administrative proceedings when it suspended federal aid to the school system. The court decided that further district court proceedings were necessary because the Department of Education's order deferring federal funds to the Dougherty County School System made no distinction among the programs to which the funds were applied. Consequently, it remanded the case to the district court for further proceedings consistent with the Supreme Court's opinion.

Several Arkansas school districts whose boundaries were either entirely or partly within national forest boundary lines brought an action seeking a share of monies received under the Payments in Lieu of Taxes Act (Title 31, U.S.C. sections 1601 *et seq.*).[44] The school districts alleged that the defendant counties had received payments from the United States Secretary of Interior for "entitlement lands" but had not paid monies to the plaintiff school districts. They claimed regulations adopted by the secretary excluding school districts from the units of local governments that were entitled to receive payments in lieu of taxes were in excess of the secretary's authority. They also claimed that Arkansas counties were required to distribute payments in lieu of taxes to school districts because, according to the principles used by the Bureau of the Census, they are units of local government. They also alleged that such funds should be distributed between counties and school districts in the same ratio as provided by the millage rate for ad valorem tax revenues. The federal district court ruled the secretary of the interior did not exceed his authority in promulgating the regulation in question. It also held that even if an Arkansas statute governing apportionment to counties within national forests applied to funds received under the Payments in Lieu of Taxes Act, the state statute conflicted with the supremacy clause of the United States Constitution. Consequently, judgment was rendered for the defendants.

---

[42] Granite Nutrition Coalition v. Board of Educ. of Granite School Dist., 711 F.2d 953 (10th Cir. 1983).

[43] Dougherty Cty. School Sys. v. Bell, 694 F.2d 78 (5th Cir. 1982).

[44] Altus-Denning School Dist. No. 31 v. Franklin Cty., 568 F. Supp. 95 (W.D. Ark. 1983).

6.2d School Fees

The United States Supreme Court upheld the constitutionality of a Texas statute permitting a school district to deny tuition-free admission to a minor living apart from his parent or guardian if his presence in the district was for the primary purpose of attending the public schools.[45] The case involved a minor child who was a United States citizen but whose parents were Mexican citizens residing in Mexico. The boy was living with his sister in McAllen, Texas, for the primary purpose of attending school in the McAllen Independent School District. The Texas Education Code [Section 21.031(d)] denies tuition-free attendance to a minor living apart from a parent or guardian if the primary purpose of the minor's presence in the school district is to attend the public schools. Plaintiff alleged that this statute violated the equal protection and due process clauses of the fourteenth amendment. The federal district court granted judgment for the defendants, as did the United States Court of Appeal.

The Supreme Court stated that "[a] bona fide residence requirement, appropriately defined and uniformly applied . . . does not violate the Equal Protection Clause of the Fourteenth Amendment."[46] The Court held the Texas statute to be bona fide residence requirement that satisifed constitutional standards. It commented that the statute in question was far more generous than the traditional residency standard because a child satisfied the statutory test so long as he was not living in the district for the sole purpose of attending school.

---

[45] Martinez v. Bynum, 103 S. Ct. 1838 (1983).
[46] *Id.* at 1842.

The Santa Barbara, California, school district decided to impose a fee for participation by high school students in after-school sports, drama, choral, and orchestra performances. Action was brought seeking to enjoin the imposition and collection of the fee. Plaintiffs contended that the fees violated both the California Constitution and the state administrative code. The trial court concluded the fees were not prohibited by the state constitution, the state administrative code, or the equal protection guarantees of the state and federal constitutions. However, the California Court of Appeal reversed the trial court's decision because the "performances" for which the activity fees were charged, although labeled "extra-curricular" by the respondents, were in fact an important part of the courses to which they related even if a student received credit for graduation without taking part in them. It determined that the performances were directed by school personnel, used school facilities, and were inextricably linked to courses offered for credit by the school. It found that the California Education Code does not permit local school districts to educate students by means other than by public expense and that the fees in question conflicted with, were inconsistent with, and preempted provisions of the California administrative code.[47]

A local education association in New Jersey raised questions concerning the degree of control a local board of education exercised over a driver education program in its high school.[48] High school sophomores in the district were required to attend for credit five weeks of classroom instruction in driver education. Behind-the-wheel training was offered after school, evenings, and weekends by the adult evening school for a fee of $105. The administrative law judge concluded that failure to provide behind-the-wheel instruction in the regular school curriculum was not a denial of a thorough and efficient education; that classroom instruction in driver education was an integral part of the school curriculum; that behind-the-wheel training was an integral part of the driver education program; that behind-the-wheel training may be separated from curricular offerings incorporated in the regular school day (assuming proper supervision and the use of certified teachers); and that the board may not charge a tuition fee for pupils participating in the behind-the-wheel training program.

On review the state commissioner of education set aside the administrative law judge's decision and awarded summary judgment for the board of education. The plaintiff education association appealed.

---

[47] Hartzell v. Connell, 186 Cal. Rptr. 852 (Cal. Ct. App. 1982).

[48] Parsippany-Troy Hills Educ. Ass'n v. Board of Educ., 457 A.2d 15 (N.J. Super. Ct. App. Div. 1983).

The appellate court determined that New Jersey statutory provisions and associated regulations "leave little doubt that the choice of which courses to offer, and, necessarily, the content of those courses, is a discretionary decision left to the local boards of education, subject only to the periodic review of the Commissioner and State Board of Education,"[49] and concluded that the local board's decision not to offer behind-the-wheel training was within its discretion. The court found no reason to require behind-the-wheel training be taught within regular school hours. It held that charging a fee for behind-the-wheel training was permissible, thus upholding the ruling of the state commissioner of education.

6.3 SCHOOL TAX ISSUES

6.3a Power to Tax

An Illinois statute permitted school districts to incur indebtedness and issue bonds to create a working cash fund. When two Illinois school districts levied taxes to pay the principal and interest on bonds issued to *increase* the amount of their existing working cash funds, taxpayers objected.[50] They argued that the districts had previously created working cash funds and had no authority to issue bonds to increase the amount in the existing working cash fund. The trial court ruled in favor of the school districts and the taxpayers appealed. The appellate court reversed the decision. It noted that Illinois statutes provided two means of increasing the amount of money in a working cash fund: (1) by levying a working cash fund tax and (2) by abolishing the fund and creating a new one. The court therefore held that school district boards had no authority to incur indebtedness and issue bonds for the purpose of increasing the amount of money in an existing working cash fund.

In Pennsylvania, a township and a school district each levied "business privilege taxes" under the authority of Pennsylvania's Local Tax Enabling Act.[51] Taxpayers-merchants engaged in the wholesale or retail sale of goods claimed the taxes in question exceeded the maximum limitations and sharing provisions of the Local Tax Enabling Act, which established limits on the rate and basis of the tax and also provided that when two political subdivisions each imposed a tax permitted under the act the maximum rate of tax would be one-half of the rate provided in the statute. The school district and the township argued that the taxes in question were "business-privilege taxes" and merely utilized the volume of business as a measure of the tax. The trial court ruled in favor of the taxpayers and the Commonwealth Court of Pennsylvania affirmed. It noted that the nature of a tax is to be determined by its substance, not by its label; that merely labeling a tax "a business-privilege tax" does not necessarily make it one; and that the taxes in question were invalid and illegal to the extent that they exceeded the limitations and sharing provisions of the local tax Enabling Act.

---

[49] *Id.* at 18.

[50] People *ex rel.* Walgenbach, 452 N.E.2d 760 (Ill. App. Ct. 1983).

[51] Coney Island v. Pottsville Area School Dist., 457 A.2d 580 (Pa. Commw. Ct. 1983).

Taxpayers in a Texas school district attacked the authority of the district to levy a tax, claiming that the qualified voters of the district had never voted approval of the tax as required under the Texas Constitution (article VII, section 3).[52] Freer Independent School District was validly created in 1976 by splitting it off from an existing school district. The plaintiffs did not challenge the validity of the district's creation; they challenged the authority of the district to levy, assess, or collect ad valorem taxes in the absence of an election held for that purpose. The Texas Court of Appeals found that the affirmative, *and exclusive*, grant of power allowing a school district to levy the taxes in question was conferred by article VII, section 3 of the Texas Constitution. The court declared the taxes in question void because they had never been authorized at an election held for that purpose as the constitution required.

In a New York case the petitioners sought to compel a county board of assessors to cancel certain tax exemptions for school purposes.[53] The statute permitted an exemption of 50% of the increased value resulting from construction or alteration of real property with the exemption to be reduced by 5% each subsequent year. The statute also permitted a school district to reduce the percentage of exemption by resolutions of the school boad. The court held that the resolutions reducing tax exemptions in the school districts involved were valid and effective and that the duty of the county boad of assessors to cancel the tax exemptions and assess the proprety was a continuing one.

In a case decided by the Supreme Court of Pennsylvania,[54] a hospital claimed it was exempt from real estate taxes imposed by a school district. The county board of property assessment had denied the hospital's application for an exemption; the trial court held in favor of the hospital; the commonwealth court reversed the orders of the trial court, and the hospital appealed. The Pennsylvania Supreme Court held that the hospital was entitled to tax-exempt status. The issue in dispute was whether the hospital was "endowed and maintained by public or private charity" as required by the Pennsylvania Constitution (article VIII, section 2). The court ruled the hospital met this test despite the fact that cash donations covered only a small part of its day-to-day operating costs, with the remainder billed to patients. It concluded that the word "charity" as used by the legislature did not contemplate that there by only a nominal charge to beneficiaries of the hospital's services.

---

[52] Manges v. Freer Indep. School Dist., 653 S.W.2d 553 (Tex. Ct. App. 1983).

[53] Walker v. Board of Assessors of Nassau Cty., 460 N.Y.S.2d 726 (N.Y. App. Div. 1983).

[54] West Alleghany Hosp. v. Board of Property Assessors, 44 A.2d 1170 (Pa. 1982).

Taxpayers in Florida who had resided in that state for less than five years challenged the constitutionality of a Florida statute establishing a five-year residency requirement as a pre-requisite to entitlement to a $25,000 homestead tax exemption.[55] The district court held the statute constitutional and the taxpayers appealed. The Supreme Court of Florida held the statute was unconstitutional because it violated the equal protection clause of the Florida Constitution. The state constitution was amended in 1980 to provide a three-step enhancement of homestead exemptions, to reach $25,000 in 1982. The Florida legislature, in a statute implementing the constitutional amendment, added a provision specifying that only those who had been permanent residents of the state for at least five consecutive years would be entitled to the $25,000 exemption. The court found that the statute failed to pass even a minimal rational basis test. The court reasoned:

> We fully realize that tax exemptions and disparity in taxes are not totally prohibited. However, there must be at least a rational basis for disparities to exist. None of the four bases argued by the state and expressed in Speaker Haben's affidavit meets the rational basis test. First, it is constitutionally prohibited for this state to impose different taxes on its citizens based soely on their length of permanent residence in the state. Second, it is not a legitimate state purpose to reward certain citizens for past contributions to the detriment of other citizens. Third, we find five years is an unreasonable period of time to establish bona fide residency and is unnecessary to discourage fraudulent homestead exemption applications. Fourth, the avoidance of possible or excessive immigration of individuals to this state is clearly not constitutionally permissible. Finally, the conditional language in article VII, section 6(d), Florida Constitution, does not in our opinion give the legislature blanket authority to violate the equal protection clause of Florida's constitution.[56]

---

[55] Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982).

[56] *Id.* at 545.

Georgia taxpayers brought suit against various public officials in which they raised constitutional issues concerning the equalization of assessments among counties, the use of local option sales tax proceeds for educational purposes and establishing 40 percent of fair market value as the assessed value of tangible property.[57] The trial court ruled in favor of the defendants and taxpayers appealed. The Supreme Court of Georgia affirmed the lower court's judgment. It held that the general assembly had inherent power to require uniformity of taxation between counties and that such power could be delegated to the state revenue commissioner. The court also ruled that excluding education from the purposes for which the income from a local options sales tax could be used violated no constitutional provisions and that the establishment of 40 percent of fair market value as the assessment rate for tangible property did not conflict with the constitution.

In a Florida case taxpayers contested the validity of a discretionary two-mill tax levy imposed by the School Board of Marion County.[58] The trial court denied relief and plaintiffs appealed. The court of appeal held that the school board's tax levy was illegal and void because the board had failed to comply with statutory requirements concerning notification to the public of its intention to consider the tax increase. The school board failed to publish notices in the places and formats specified by statutes. The board argued that it had acted in substantial compliance with statutory requirements concerning publication of notice, but the court disagreed. The court ruled that three of the defects in publishing notice of the proposed tax were fatal to the validity of the tax because they deprived taxpayers of notice of the intended levy and of their right to attend the meetings where they could be heard and where the school board could explain the need for and purposes of the proposed levy.

A taxpayer in Nebraska contested the levy established to pay nonresident high school tuition.[59] The Supreme Court of Nebraska affirmed the trial court's decision, holding that a taxpayer who objected to the levy was required to give notice of appeal within ten days after the levy had been set by the county board of equalization. The court noted that levying a tax for the purpose of paying nonresident high school tuition was a ministerial function of the county board of equalization under Nebraska statutes. Because the taxpayers had not given notice of appeal of the nonresident tuition levy within ten days, they had failed to meet statutory requirements and the court was without jurisdiction.

---

[57] Salem v. Tattnall Cty., 302 S.E.2d 99 (Ga. 1983).

[58] Wilson v. School Bd. of Marion Cty., 424 So.2d 16 (Fla. Dist. Ct. App. 1983).

[59] *In re* 1981-82 County Tax Levy by Saunders Cty., 335 N.W.2d 299 (Neb. 1983).

A case decided by the Supreme Court of Michigan dealt with the constitutionality of a Michigan statute that authorized "variable millage" to be levied against the property of the various municipalities included within a single school district. In effect, the statute permitted a higher school tax rate to be levied on property located within one municipality than on property located in another municipality within the same school district. The Kent County Tax Allocation Board, acting under the provisions of the statute, had for a number of years authorized an extra mill of school tax upon property in the City of East Grand Rapids in comparison to the school tax rate authorized upon property in the Grand Rapids Township. In 1979 the board of tax allocation announced it would no longer authorize variable millage because it believed the statute was unconstitutional. The Supreme Court of Michigan ruled the statute in question violated the uniformity clause of the Michigan Constitution (article 9, section 3).[60] In so doing, it overruled its earlier decision upon which the lower courts had relied in holding in favor of the school district.

The Commonwealth Court of Pennsylvania affirmed a lower court ruling that a school district had not violated the requirements of a taxation statute by amending an original tax notice to inform taxpayers that the ceiling on penalties for late payment of the tax had been raised by the general assembly after delivery of the original notice, nor had it improperly applied the amendment retroactively to determine taxpayers' tax liability.[61]

An Oregon case involved the validity of a referendum reducing the tax base previously established for a school district.[62] The referendum was held as a result of an initiative petition and resulted in a vote to reduce the tax base. The Court of Appeals of Oregon held that a school district was not a "district" within the meaning of the portion of Oregon's constitution providing for initiative and referendum. Consequently, the court determined that a valid measure to reduce the school district's tax base was not a proper subject for initiative and that the results of the referendum were void.

A Pennsylvania taxpayer complained of procedural defects in a school district's tax levy and also challenged the constitutionality of Pennsylvania's system of school finance because it relied primarily upon local tax revenues.[63] The school district and the Commonwealth of Pennsylvania filed objections to the taxpayer's complaint and the commonwealth court took original jurisdiction. The taxpayer claimed he had not received notice of school taxes for 1977 on a parcel of property he owned, although he had paid the school taxes levied on other properties he owned. In April, 1978, he offered to pay the tax due on the parcel but refused to pay the 10 percent late payment penalty. The tax collector refused to accept the payment, because under state statute the late payment penalty must be added to the tax originally assessed to constitute the tax then due, and lodged a tax claim against the parcel of property. A series of actions followed and nearly four years later the taxpayer amended his petition to join the commonwealth and its department of education to challenge the constitutionality of Pennsylvania's public school financing system. The court ruled that, in view of a statute providing that failure to receive notice would not relieve any taxpayer from payment of any taxes imposed, the claimed failure of the school district and township to meet notice requirements prescribed by the statute provided no ground to dismiss, reduce, or set aside the lien against the property. The court also ruled that the tax collector had properly refused the offer to pay the tax without penalty and that the taxpayer's challenge to the constitutionality of the state school finance system failed to state a cause of action because it did not allege any student in the district was legally injured or that students were being denied adequate basic education.

---

[60] School Dist. of City of East Grand Rapids v. Kent Cty. Tax Allocation Bd., 330 N.W.2d 7 (Mich. 1982).

[61] Greenberg v. Lower Merion School Dist., 462 A.2d 972 (Pa. Commw. Ct. 1983).

[62] Deboard v. Owen, 662 P.2d 19 (Or. Ct. App. 1983).

[63] Lal v. West Chester Area School Dist., 455 A.2d 1240 (Pa. Commw. Ct. 1983).

Another Pennsylvania taxpayer appealed a sentence of fines, costs, and 120 days imprisonment for failure to pay taxes on earned income to the Southwest Butler County School District.[64] The appellant was first convicted and sentenced in April, 1979. On appeal, the sentence was modified with respect to the amount of taxes due but affirmed in all other respects. After all fines and costs were paid, the plantiff's counsel moved to modify the sentence by vacating the 120 days imprisonment. The court ruled that, under the controlling staute, once a delinquent taxpayer had paid all fines and costs there can be no further sentence of imprisonment. Thus, the court vacated the jail term.

The Hays, Texas, School District appealed a take-nothing judgment entered by the trial court when the district sued to recover delinquent ad valorem taxes, penalties, and interest.[65] The Valero Transmission Company claimed the district's board of equalization had placed a fair market value on its property far greater than the property's actual fair market value; that the district had adopted an arbitrary and discriminatory plan and scheme of taxation; and that ranch and farm land within the district was assessed at a far lower ratio to fair market value than were properties of the company. The school district appealed the trial court judgment and the Texas Court of Appeals reversed the decision. The court of appeals observed that the statutes provided only three defenses to a suit for collection of delinquent taxes. It held that the trial court erred in declaring the district's assessed valuation void and invalid on the basis that it was grossly in excess of that allowed by law, or on the basis that it resulted from a discriminatory plan of taxation adopted by the district, because there had been no pleading to support these affirmative defenses. The court also found the taxpayer had failed to attack the assessment until the district brought suit to collect the unpaid tax. Because the taxpayer had not acted in a timely fashion, it was not sufficient to show that the assessment resulted from an arbitrary, unlawful, or discriminatory plan; the taxpayer also was required to establish the extent to which the assessment was excessive, for his relief, if any, is limited to that amount.

---

[64] Smith v. Commonwealth *ex rel.* Southwest Butler Cty. School Dist., 452 A.2d 1135 (Pa. Commw. Ct. 1982).

[65] Hays Consol. Indep. School Dist. v. Valero Transmission Co., 645 S.W.2d 542 (Tex. Ct. App. 1982).

A dispute between Niagara Mohawk Power Corporation and the Troy school district concerning school taxes reached the Court of Appeals of New York.[66] The court of appeals held that taxes assessed and collected in violation of constitutional authority may be recovered by the taxpayer and that a taxpayer may challenge a levy collaterally without meeting statutory conditions precedent or following procedures of the real property tax law when the taxing authority exceeds its power. The court explained its reasoning as follows:

> Central to our decision is the distinction between conduct of the taxing authority which is erroneous and conduct which is illegal, between a special proceeding instituted to correct action the taxing authority is empowered to perform but which it has performed imperfectly, and a plenary action attacking action which exceeds the taxing authority's powers.[67]

6.3b Relationship of School Districts to Other Government Units

The Boston Teachers Union tried to enjoin the Mayor of Boston from reducing the Boston School Committee's supplemental financial request.[68] The trial court decided that the school committee, in response to comments by the mayor, could withdraw a supplemental appropriation request and submit a request for less funds and the teachers' union appealed. The Appeals Court of Massachusetts affirmed the lower court decision. The plaintiffs argued that the mayor was bound under previous decisions to transmit the original request and had failed to do so, choosing instead to bargain with the school committee about its request. In upholding the mayor's action in this situation, the court commented

---

[66] Niagara Mohawk Power Corp. v. City School Dist. of City of Troy, 451 N.E.2d 207 (N.Y. 1983). *See* THE YEARBOOK OF SCHOOL LAW 1983 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1983] at 263.

[67] *Id.* at 209.

[68] Boston Teachers' Union, Local 66 v. Mayor of Boston, 451 N.E.2d 1169 (Mass. App. Ct. 1983). *See* YEARBOOK 1982 at 228-29.

> We are of opinion that the mayor's duty to transfer the appropriation request in a timely fashion must be interpreted in light of the considerable role he plays in connection with appropriations of other items within the school committee budget. Those other items appear to have been the subject of discussion between the mayor and the school committee in this case. Transmission of the school committee's request for funds to meet previously approved pay increases is ministerial . . . but the mayor's control over the remaining supplemental budget request is absolute . . . . Where, as here, the entire collective agreement has been funded, and only costs unrelated to the collective bargaining agreement were transferred to the city's budget, the interplay between "the school committee on the one hand and the mayor and city council on the other" reflects the "unique balance of responsibilities" the Legislature intended.[69]

In another Massachusetts case the Quincy Education Association and residents of the city challenged the Quincy City Council's rejection of the committee's supplemental budget request for the 1979-80 school year, and the reduction of the committee's requst for the 1980-81 school year.[70] The Appeals Court of Massachusetts found that prior decisions made it clear that all estimates from the school committee must be in the hands of the mayor by the time he submits the recommended annual budget to the city council. Although the school committee had notified the mayor in advance that additional funds might be needed to fund new agreements, the court ruled that this was not sufficient to meet the requirement that estimates must be in the executive's hands. The court also ruled that the amount submitted by the school committee for the 1980-81 school year was subject to a 4% cap and thus the city council was acting within its power in reducing the amount requested by the school committee.

In a New Jersey case the issue before the court was the extent to which a township committee, in its review of a budget proposed by a board of education after it had been rejected by the electorate, could consider and change line items in the budget and estimates of anticipated income.[71] The state commissioner of education and the state board of education had rejected the actions of the committee and the committee appealed. The court ruled the township committee had acted arbitrarily in reducing line items in the budget and that these items were properly restored by the commissioner and the state board. However, it also ruled the committee had power to consider items of potential income as well as the school board's proposed allocation of its unappropriated free balance in its budget review and in its determination of the amount of money required to be raised by taxation.

---

[69] *Id.* at 1173.

[70] Quincy Educ. Ass'n, Inc. v. City of Quincy, 443 N.E.2d 435 (Mass. App. Ct. 1982).

In a Wisconsin case the Elkhorn School District sued the East Troy School District to recover property taxes owed to Elkhorn but erroneously paid to East Troy.[72] The trial court had ruled in favor of the East Troy district. The court of appeals affirmed because the East Troy district had received neither written notice nor actual knowledge of Elkhorn's claim within 120 days as required by statute. The court noted that the Elkhorn district had a right to be reimbursed by the East Troy district for mispaid tax revenues but, although the East Troy district may have had constructive notice of the circumstances giving rise to the Elkhorn district's claim long before the notice was served, Elkhorn had the burden of proving timely notice was given and it had failed to do so.

In Utah, the Granite School District brought suit against Salt Lake County and its treasurer to recover its share of property taxes. The treasurer brought a counter claim to recover the cost of collecting, apportioning, and distributing taxes on behalf of the school district. The Supreme Court of Utah determined that the county treasurer had failed to comply with a Utah statute that made it the duty of the county treasurer to pay to the school district on the first day of each month all money that had been collected on behalf of the district.[73] The court noted that taxes and other revenue raised for school purposes are regarded as trust funds and that the county treasurer acts as a trustee in collecting such revenues. The treasurer's delay in transferring to it revenues due the school district denied the district an opportunity to collect interest on the funds. The district would have been entitled to recover the interest it had lost had it been able to provide evidence of the amount of its funds on deposit with the treasurer. Since the district had not provided such evidence, the decision was made prospective. With regard to the county treasurer's claim that the school district had not paid the full cost of collecting its taxes, the court found that the legislature had specifically defined what tax collection expenses a county may pass through to the district and that the legislature had authority to impose a duty upon city or county officers to collect taxes for other purposes with or without compensation for any expenses they incurred.

---

[71] Board of Educ., Twp. of Branchburg v. Township Comm. of Twp. of Branchburg, 455 A.2d 549 (N.J. Super. Ct. 1983).

[72] Elkhorn Area School Dist. v. East Troy Commun. School Dist., 327 N.W.2d 206 (Wis. Ct. App. 1982).

[73] Board of Educ. of Granite School Dist. v. Salt Lake Cty., 659 P.2d 1030 (Utah 1983).

The Special School District of Fort Smith, Arkansas, sought a writ of mandamus to require any excess amount of the tax collector's commission to be disbursed to the school district.[74] The trial court entered judgment in favor of the county and the school district appealed. The county argued that because it had a combined office of sheriff and tax collector, the monies in question could be applied to the consolidated expenses of both functions of that office. The school district, however, claimed that only the necessary cost of collecting taxes could be retained by the county and any excess amount must be disbursed to the district. The Supreme Court of Arkansas ruled in favor of the district, expressly overruling its 1972 decision in *Dermott*.[75] The court held that only the expenses of tax collection could be assessed the school district and that sheriff's expenses cannot be funded by monies raised for school purposes. The court also ruled that a statute pertaining to the remission of excess collector's fees to all school districts of not less than 78,000 and not more than 84,000 population applied to only one county and therefore was unconstitutional because it was local and special legislation.

A Missouri case also involved the disposition of interest earned on deposited school funds.[76] The Supreme Court of Missouri held that its decision in *Fort Zumwalt*[77] was dispositive; that interest on deposited school funds is payable to the treasurer of the school district and is not to be credited to the general revenue fund of the county. The second issue raised in the case was whether all of the interest or only the net amount of interest after deducting the school district's proportionate share of the expenses associated with tax anticipation borrowings should be remitted to the school district treasurer. Citing the general rule that a school district is liable for only such expenses as are expressly or impliedly authorized by law, the court found no statute imposing such expenses upon school districts and therefore ruled they could not be held liable for such expenses.

---

[74] Special School Dist. of Fort Smith v. Sebastian Cty., 641 S.W.2d 702 (Ark. 1982).

[75] Dermott Sp. School Dist. v. Brown, 485 S.W.2d 204 (Ark. 1972).

[76] State *ex rel.* School Dist. of Springfield v. Wickliffe, 650 S.W.2d 623 (Mo. 1983).

[77] State *ex rel.* Fort Zumwalt School Dist. v. Dickherber, 576 S.W.2d 532 (Mo. 1979).

A South Carolina taxpayer alleged that members of the Orangeburg County Council lacked authority to pass an ordinance setting forth the method of establishing the school tax millage.[78] The governor appointed the members of the Orangeburg County Board of Education and a board of trustees for each school district in the county was elected by qualified electors. Legislation adopted in 1979 provided that the appointed board should establish the county's school tax millage but the Supreme Court of South Carolina ruled in 1981[79] that participation by an appointed board of education in establishing a county school tax levy constituted taxation without representation. As a result, the Orangeburg County Council adopted the ordinance that was questioned by the taxpayer. The Supreme Court of South Carolina held that the county council acted within its authority because the intent of the legislature was preserved by allowing the county council to prescribe the method of establishing the school tax millage.

The Indianapolis Board of School Commissioners appealed from dismissal of its action against a county board of tax adjustment.[80] The board of tax adjustment was permitted under Indiana law to reduce "the excessive tax levy to the maximum normal tax levy." However, the board of tax adjustment reduced the Indianapolis school budget by more than $4 million below the maximum normal tax levy. The statutes permitted the Indianapolis Board of School Commissioners to challenge the board of tax adjustment's action using either of two appeal procedures. However, the school commissioners did not enter a timely appeal and, by failing to do so, waived their statutory right to review by the state board of tax commissioners as well as to challenge the county board's action.

A dispute arose in Louisiana with regard to the disposition of revenue sharing funds.[81] The funds were used to offset losses attributable to homestead exemptions and were allocated to tax recipient bodies that suffered a loss due to the homestead exemptions. The city of New Orleans appealed a decision of the trial court. The court of appeal held that the school board's portion of the revenue sharing funds was to be used to offset *current* losses. Therefore, it did not permit the school board to include an extra 1.91 mills it had levied to compensate for losses in a previous year in the computation of the revenue sharing funds to which it was entitled.

---

[78] Stone v. Traynham, 297 S.E.2d 420 (S.C. 1982)

[79] Crow v. McAlpine, 285 S.E.2d 355 (S.C. 1981). *See* YEARBOOK 1983 at 267-68.

[80] Board of School Comm'rs of City of Indianapolis v. Eakin, 444 N.E.2d 1197 (Ind. 1983).

[81] City of New Orleans v. Orleans Parish School Bd., 427 So.2d 578 (La. Ct. App. 1983).

[82] Vantage Petroleum v. Board of Assessment Rev., 458 N.Y.S.2d 632 (N.Y. App. Div. 1983).

A board of education in New York appealed from an order by a trial court which denied it leave to intervene in a tax proceeding.[82] The appellate court affirmed the trial court ruling because the New York legislature had amended the statute so that a school district in Suffolk County was no longer liable for refunds of the school portion of the property tax that may be owed to a petitioner as a result of tax certiorari proceeding.

6.3c Uses of Revenue

A case decided by the United States Court of Appeals for the Tenth Circuit dealt with the question of whether the city of Aurora, Colorado, and the board of education of Joint District 28-J had authority to expend school district and city funds in connection with a referendum proposal.[83] The referendum in question would have required elector approval of new or increased taxes in any jurisdiction. The school district board of education and city council opposed the proposed amendment and made cash and in-kind contributions in opposition to the proposed amendment. Plaintiffs contended that the expenditures were beyond the authority of the school district and the city. The district court agreed with the plaintiffs and ordered reimbursement. The court of appeals affirmed the decision of the district court, holding that expenditures in opposition to the proposed amendment were not authorized either by statute or by provisions of the Campaign Reform Act governing contributions involving issues in which the state and political subdivisions have an "official concern." Although the term "official concern" had not been defined by either the legislature or Colorado courts, the court of appeals agreed with the trial court that a matter of official concern would, at the very least, involve questions that would come before public officials for a decision. Since the change proposed by the referendum would not come before city or school district offcials for approval, the district court's decision was affirmed.

A New York school district entered into an agreement with its superintendent of schools under which the superintendent agreed to resign his position and the school district agreed to pay him a lump sum of $65,000 and continue several insurance policies until the termination date of his contract.[84] Residents of the school district petitioned for review of the settlement agreement. The trial court directed that a hearing be held to determine the factual question of whether the board exceeded its authority in agreeing to a lum-sum settlement in return for the superintendent's resignation and the school board appealed. The appellate court affirmed the trial court's decision, holding that the plaintiffs had standing because the state constitution forbade gifts of public funds. The court noted, however, that payment of public funds in damages for a breach of contract or in settlement of a contested claim is not prohibited and decided that a hearing was necessary to determine whether the school board had exceeded its authority.

---

[83] Campbell v. Joint Dist. No. 28-J, 704 F.2d 501 (10th Cir. 1983).

[84] Ingram v. Boone, 458 N.Y.S.2d 671 (N.Y. App. Div. 1983).

1

7

PROPERTY

Steven M. Goldblatt*

Introduction 7.0
General School Board Authority over Property Matters 7.1
Attachment and Detachment of Land 7.2
School Bond Referenda 7.3
Zoning and Development 7.4
Building Design and Construction 7.5
Competitive Bids 7.5a
Construction Funding 7.5b
Prevailing Wages 7.5c
Roofs 7.5d
Design and Performance 7.5e
Contractor Claims 7.5f
Arbitration 7.5g
School Closures 7.6
  General 7.6a
  Desegregation 7.6b
Property Taxes 7.7
Personal Injury 7.8
Trespass 7.9
Landlord/Tenant 7.10
Higher Education 7.11
  General Board Authority 7.11a
  Zoning and Development 7.11b
  Building Design and Construction 7.11c
  Property Taxes 7.11d
  Personal Injury 7.11e
  Landlord/Tenant 7.11f
  Estates 7.11g
  Bankruptcy 7.11h
  Income Taxes 7.11i
  Nuisance 7.11j

*The author acknowledges Kenneth M. Bloom, Marc J. Erlandson, Mark E. Fairhart, and Richard E. Lander for their research assistance.

7.0 INTRODUCTION

Due to wider coverage, this year's property chapter reports more than twice last year's number of cases and more than five times the total of the year previous. New sections include property tax, personal injury, landlord/tenant, and trespass cases. The zoning section has grown and the higher education section has expanded dramatically.

No new trends emerge in this year's cases. Only a dozen states go unrepresented, while seven states generate over half of the cases and New York state alone more than 20 percent.

7.1 GENERAL SCHOOL BOARD AUTHORITY OVER PROPERTY MATTERS

Courts support the reasonable exercise of school board authority, but find excessive those acts that are arbitrary or ignore established policies and procedures.

In Kansas, a church requested permission to rent space in a school building for Sunday morning services. The district denied the request, as it would violate a district policy allowing rental only for nonreligious meetings. The United States district court ordered the district to allow the church to rent the space. By allowing the school to be used during nonschool hours by other groups, the district had created a "public forum" and could not exclude the church because of religious content.[1]

Arkansas landowners filed a petition alleging that they had no reasonable access to their land. Pursuant to state law, they asked that a road be established across a school district's property. The district requested that the petition be denied since other access was available and the proposed road would endanger school children. The county court denied the petition and the landowners appealed to the circuit court and, finally, to the supreme court. The supreme court upheld the decision, ruling that an alterante route, though costly, was available.[2]

For many years, a New York teachers' association had used school buildings for office space without a written lease. The superintendent told the association that its "license" to use space was being terminated. The association brought an action to enjoin its removal until the matter was arbitrated. The court of appeals, reversing the decision of the lower court ruling that the matter was not arbitrable, held that the right of the association to use office space in school buildings fell within

---

1. Country Hills Christian Church v. Unified School Dist. No. 512, 560 F. Supp. 1207 (D. Kan. 1983).

2. Armstrong v. Harrell, 648 S.W.2d 450 (Ark. 1983).

the arbitration clause of its labor contract. Also, the arguments of the board that the arbitrator might make an award that could be in violation of public policy did not justify judicial intervention in the arbitration process at that stage.[3]

A Pennsylvania school district levied a tax on privileges of obtaining building permits and engaging in construction. The commonwealth court found the levy to be "unreasonable" and declared the tax invalid. However, the supreme court found the tax to be valid up to the date of an amended legislative act, and invalid thereafter.[4]

In 1965, a Tennessee city and county had entered into a contract to renovate an existing school and construct a new facility outside the city limits, but within the county. The new facility was leased to the city as long as the facility was used to educate city and county students, and the county agreed to pay the city for county students going to school. In 1976, the county moved to take control of the new school. The trial and appeals court held that joint control was necessary. The parties requested supreme court review and that court found the city to have control.[5]

In Virginia, a suit was filed against a school board seeking specific performance of its verbal contract to purchase real estate. The trial court ruled against the board. The supreme court reversed that decision, reaffirming the code that required such contracts to be in writing.[6]

In Michigan, a circuit court ordered specific performance of a verbal agreement between a school district and taxpayers to share the cost of constructing a road. The district appealed the order to share the costs, stating that the agreement was void because no time for performance was specified and current construction costs were unreasonably high. The court of appeals affirmed the decision, ruling that, when a contract is silent regarding the time of performance, the law should presume a reasonable time.[7]

The taxpayers of a New York school district brought an action against the district, seeking the voiding of a lease of district property to a cooperative educational service. At trial, the taxpayers motioned for a preliminary injunction and the school cross-motioned to dismiss the complaint. Dismissal was granted by the court. Upon appeal, the supreme court ruled in favor of the district because the original complaint was based upon an alleged violation of a statute that was inapplicable to the facts.[8]

---

[3] Board of Educ. of Connetquot Cent. School Dist. v. Connetquot Teachers Ass'n, 458 N.E.2d 373 (N.Y. 1983).

[4] Heisey v. Elizabethtown Area School Dist., 467 A.2d 818 (Pa. 1983).

[5] Hamblen Cty. v. City of Morristown, 656 S.W.2d 331 (Tenn. 1983).

[6] School Bd. v. Burley, 302 S.E.2d 53 (Va. 1983).

[7] Bruno v. Zwirkoski, 335 N.W.2d 120 (Mich. Ct. App. 1983).

A New York school board solicited bids to sell a parcel of undeveloped land. The bid solicitation contained certain "restrictive clauses" and the petitioner submitted an offer in conformance with the bid specifications. The only other bid was lower, but the bid solicitation to the low bidder did not include the restrictive clauses. The low bid varied substantially and materially from the advertised bid specifications. Nevertheless, the board awarded the contract to the low bidder. The county court granted a motion to dismiss the petition. However, the supreme court, appellate division, held that the board had exceeded its authority to sell school property by rejecting the highest, responsible offer submitted by a responsible bidder. The dismissal was reversed and the petition remitted for further action.[9]

Ohio taxpayers and parents of students brought an action against a school board to enjoin the completion of a plan to terminate the eighth grade from one school and transfer the students to another. The court of appeals, reversing the decision of the lower court against the board, found that there was no restriction or limitation upon its authority to terminate respective grades and transfer them to another school that met all minimum standards for schools having such grades.[10]

The Ohio state board of education assigned a school district to a membership in a vocational school district. The school district appealed to the trial court, which dismissed the motion. In reversing, the court of appeals found that the resolution by the state board was quasi-judicial in nature and subject to judicial review.[11]

A Texas school board leased a portion of its property, offering the lessee a purchase option. An agent of the lessee stated several times that he was exercising the purchase option. The lease expired, but both parties continued the status quo. Several years thus passed when the lessee filed suit demanding specific performance of the purchase option. The trial court, with the district court of appeals affirming, ruled that proper notice of the purchase had not been made prior to the lease expiration date. The courts granted the board's motion for judgment n.o.v.[12]

---

[8] Beil v. Russo, 465 N.Y.S.2d 425 (N.Y. Sup. Ct. 1983).

[9] Merritt Meridian Constr. Corp. v. Gallagher, 466 N.Y.S.2d 381 (N.Y. App. Div. 1983).

[10] Ferris v. Paulding Exempted Village School Dist. Bd. of Educ., 454 N.E.2d 957 (Ohio Ct. App. 1983).

[11] *In re* New Riegel Local School Dist., 456 N.E.2d 1245 (Ohio Ct. App. 1983).

[12] Thermo Products Co. v. Chilton Indep. School Dist., 647 S.W.2d 726 (Tex. Civ. App. 1983).

7.2 ATTACHMENT AND DETACHMENT OF LAND

Petitions for land attachment and detachment, school district dissolution, and student transfer are generally upheld by the courts, except in some cases where "competing" districts have legitimate, opposing interests.

In Alaska, the state approved the transfer of land and buildings to a city school district. A regional school district that was using a portion of the building filed suit against the state, contending that a state statute mandated transfer to it of those portions of the building that it used. On appeal, the supreme court found that under the statute, transferring for partial conveyance of the portion of the building being used was not required.[13]

An Arkansas school district requested its county board of education to transfer 240 acres of land from another district to itself. A 1941 court order had awarded the land to the other district. The circuit court affirmed the transfer, but, upon appeal, the case was remanded for retrial. Again the trial court approved the transfer and the supreme court affirmed that decision. The 1941 court order was termed void due to an ambiguous land description, and written consent had not been made by certain parties as requird by the law then in effect.[14]

A Mississippi city proposed annexation of some land, a portion in the city school district and the remainder in another. State law provided that such lands be merged with the municipal district. The other district filed a petition for a referendum on the question of merger, citing a statute adopted years earlier for a similar case. The trial court ruled that the cited statute was not applicable to this circumstance and the supreme court affirmed the decision.[15]

In Nebraska, taxpayers petitioned for the freehold transfer of their land into another school district. A freeholder board denied the transfer. Both the district court and the supreme court reversed that decision, citing as the sole issue in freehold transfer cases "the best educative interest of the child."[16]

A Nebraska superintendent announced at a public hearing that he was dissolving the school district and merging it with another because there were no students. The trial court immediately issued a temporary injunction against such action, but dissolved the injunction. The district appealed on the grounds that any dissolution should have been announced after a public hearing and that the district was denied due process before an impartial hearing officer. The supreme court judged the appeal to be without merit.[17]

---

[13] State v. Bering Strait Reg. Educ. Attendance Area School Dist., 658 P.2d 784 (Alaska 1983).

[14] Board of Educ. v. Ozark School Dist. No. 14, 655 S.W.2d 368 (Ark. 1983).

[15] Western Line Consol. School Dist. v. Greenville Mun. Sep. School Dist., 433 So. 2d 954 (Miss. 1983).

[16] Janzen v. Norquest, 330 N.W.2d 481 (Neb. 1983).

In North Dakota, a state committee for school district reorganization approved a local committee's dissolution plan. The district court reversed the order, and the decision was appealed. The supreme court held that the dissolution order of the local committee was not subject to direct judicial review and the approval by the state committee was supported by the evidence.[18]

In North Dakota, parents petitioned the state board of education to allow their children to attend a school much closer to home. The board denied annexation so the school district appealed to district court. The appeal was dismissed because the district was not an aggrieved party, as were the parents, and the supreme court affirmed the dissmissal.[19]

In Illinois, owners of a large tract of land appealed a denial of petition for disconnection from one school district and annexation to another. The property involved was uninhabited, but the hearing board had to decide the welfare of future pupils who might reside there using the "whole child" and "community of interest" factors. Affirming the trial court's order for disconnection and annexation, the appellate court found that the overall benefit to the annexing district outweighed the costs to the losing district.[20]

In Illinois, individuals brought a petition to transfer territory from one school district to another. One county school board approved the petition and the other board denied the petition. The issue was whether the withdrawal of signatures from the petition prior to the denial was proper basis for the denial. The appellate court, in reversing a circuit court decision, ruled that the withdrawal of names from the petition was timely and the denial was not proper.[21]

---

[17] School Dist. No. 39 v. Farber, 341 N.W.2d 320 (Neb. 1983). In Nebraska, a taxpayer and former resident brought suit against a superintendent who intended to dissolve the school district and merge it with another. The plaintiff did not dispute the dissolution itself, but the choice of district to be merged with. Affirming the trial court's decision in favor of the superintendent, the supreme court found his actions "neither arbitrary, capricious, nor unreasonable." Acklie v. Jensen, 341 N.W.2d 918 (Neb. 1983). Nebraska landowners appealed from an order by a county school superintendent dissolving her school district. The district court dismissed the appeal petition for lack of jurisdiction. The dismissal was based on the defendant's contention that certain "irregularities" in the plaintiff's method of appeal had invalidated the appeal, thus preventing the district court from acquiring jurisdiction. The supreme court ruled that the "irregularities" did not prevent jurisdiction by the lower court and remanded the case to it. Stigge v. Graves, 332 N.W.2d 49 (Neb. 1983).

[18] Garner Pub. School Dist. No. 10 v. Golden Valley Cty. Comm. for Reorg. of School Dist., 334 N.W.2d 665 (N.D. 1983).

[19] Washburn Pub. School Dist. No. 4 v. State Bd. of Pub. School Educ., 338 N.W.2d 664 (N.D. 1983).

[20] City Nat'l Bank of Kankakee v. Shott, 447 N.E.2d 478 (Ill. App. Ct. 1983).

An Illinois appellate court affirmed the order of a regional board of school trustees dismissing, for lack of jurisdiction, a petition for detachment. The court held that the board's action was not necessarily arbitrary and capricious simply because it issued its decision before it made express findings of fact and conclusions of law and the board had authority to reconsider its jurisdiction regardless of any authorization or lack thereof by a trial court.[22]

The Ohio state board of education denied the request of a village to transfer a portion of its territory to another school district. Village residents appealed to the trial court, which claimed lack of jurisdiction and dismissed the appeal. The appeals court affirmed the dismissal.[23]

An Oregon school district boundary board denied a petition for the transfer of land from one district to another. The petitioners appealed and the court of appeals reversed and remanded the board's decision. The board again denied the petition and again the denial was appealed. The court of appeals held that the educational equality of the two districts and the fact that the petitioners would receive a tax advantage were not sufficient reasons to deny the petition. The denial was reversed and remanded for further action.[24]

7.3 SCHOOL BOND REFERENDA

An existing school having been destroyed by fire, a Mississippi school board proposed a bond issue for new facilities' construction at a new location. The bond issue was passed overwhelmingly by voters. However, the state educational finance commission denied construction at the new site and offered alternative sites, citing low local population density, potential high transportation costs, and inferior access roads. The board argued rapidly increasing local population, zero land cost, and location away from undesirable influences existing at the previous facility. The local chancery court reversed the denial on grounds of insubstantial evidence. The supreme court affirmed that decision.[25]

Two Illinois school districts levied property taxes to pay for bonds issued to increase working cash funds. Tax objectors argued that districts could issue bonds to *create* working cash funds but could not incur additional indebtedness by issuing bonds to *increase* their working cash funds. The trial court ruled in favor of the districts. However, the appellate court ruled that creating a fund was a single act and the only way to increase an existing working cash fund was by tax levy. The original decision was thus reversed.[26]

---

[21] Konald v. Board of Educ. of Commun. Unit School Dist. 220, 448 N.E.2d 555 (Ill. App. Ct. 1983).

[22] Shapiro v. Regional Bd. of School Trustees of Cook Cty., 451 N.E.2d 1282 (Ill. App. Ct. 1983).

[23] *In re* Cleveland City School Dist., 446 N.E.2d 493 (Ohio Ct. App. 1982).

[24] Messer v. Polk Cty. Dist. Boundary Bd., 670 P.2d 183 (Or. Ct. App. 1983).

[25] Educational Fin. Comm'n v. Jackson Cty. School Dist., 415 So. 2d 680 (Miss. 1982).

In North Carolina, concerned citizens brought suit against a county to invalidate a school bond referendum. The trial court granted the county's motion for summary judgment. Upon appeal by the citzens, the appeals court affirmed and found the citizens' claims not only barred since the statute required challenges be brought within thirty days, but also without merit.[27]

7.4 ZONING AND DEVELOPMENT

This expanded section reports cases of zoning, development, and land use issues. Half of the cases involve church attempts to operate schools in restricted areas.

In Alaska, a church sought relief against enforcement of a zoning restriction on nonpublic schools. The church desired to operate a parochial school in the church building. The superior court entered a judgment in favor of the city. Upon appeal, the supreme court held that a zoning ordinance excluding nonpublic schools from a newly created "rural residential" zone was based on a reasonable conclusion that a school may have an adverse impact, such as noise, increased traffic, and litter on the community populated by single-family residences. This was not violative of due process or an infringement of free exercise of religion.[28]

An Arkansas church board submitted a conditional use zoning application for construction of a church in a district zoned residential. The application was approved and another permit submitted for operation of a church. The zoning board again approved the application, but distinctly pointed out that school operation would require a third, separate conditional use permit. Within months, a school was operating and the trial court enjoined such actions until a school-type permit was obtained. The supreme court affirmed.[29]

In California, a school district brought an action challenging the adequacy of an environmental impact report for a proposed residential development. The court of appeal, affirming the decision of the lower court in favor of the district, held that the report should have contained evidence of present overcrowding of the high school, increasing enrollment, and the necessity for construction of one new high school, and the report was inadequate because it failed to say anything about the effects of an increase in student population and suggested no measures to deal with this impact.[30]

---

[26] People *ex rel.* v. Walgenbach, 452 N.E.2d 760 (Ill. App. Ct. 1983).

[27] Wright v. County of Macon, 308 S.E.2d 97 (N.C. Ct. App. 1983).

[28] Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293 (Alaska 1982).

[29] Abram v. City of Fayetteville, 661 S.W.2d 371 (Ark. 1983).

In California, a developer brought suit for refund of an interim facilities fee imposed under the School Facilities Act. A two-phase luxury condominium complex was being constructed and the developer contended that, by its nature, it would not cause the need for interim school facilities. The court of appeals held that the developer was entitled to pay the fee under protest and sue for a refund, and the county's denial of an exemption was reasonable and in accord with the Act's purposes.[31]

In New York, an application for a special permit proposed the use of part of a school building as a hospital billing office. The supreme court, appellate division, denied the application, holding that the school and office were separate and were thus barred by the city's zoning ordinances, and the proposed use did not satisfy the requirements for off-street parking.[32]

In New York, city officials appealed the judgment of a lower court directing them to issue a building permit for the renovation of a building into an instructional health service facility. Affirming the decision, the supreme court, appellate division, held that the interpretation of the zoning ordinance limiting the uses in the "Central Business District-Office and Service District" to music and dancing instruction would violate the plain meaning of the ordinance.[33]

The Oregon land use board of appeals determined that a city council's interpretation that its zoning ordinance required a church to obtain a conditional use permit to operate an elementary school on church premises was not a "land use decision." The court of appeals reversed and remanded, holding that the council's action was a "land use decision" and that the board had exclusive jurisdiction.[34]

---

[30] El Dorado Union High School Dist. v. City of Placerville, 192 Cal. Rptr. 480 (Cal. Ct. App. 1983).

[31] McLain Western No. 1 v. County of San Diego, 194 Cal. Rptr. 594 (Cal. Ct. App. 1983). A California school board appealed a judgment ordering it to refund certain school impact fees assessed against a residential subdivision developer. The fees were assessed under an existing contract with the developer to provide temporary facilities for already overcrowded schools. However, due to declining enrollment, new developers were not required to pay such fees. The court of appeals ruled that the payment of the fees had given the developer the benefit of acquiring a building permit, so no refund was necessary. Candid Enterprises, Inc. v. Grossmont Union High School Dist., 197 Cal. Rptr. 429 (Cal. Ct. App. 1983).

[32] Cathedral of Incarnation v. Glimm, 467 N.Y.S.2d 241 (N.Y. App. Div. 1983).

[33] Italiano v. City of Syracuse, 468 N.Y.S.2d 771 (N.Y. App. Div. 1983).

7.5 BUILDING DESIGN AND CONSTRUCTION

Significantly expanded last year, this section reports on the continuing battles among school districts, architects, contractors, subcontractors, material manufacturers and suppliers (especially of roofs), sureties, and arbitrators.

7.5a Competitive Bids

An Illinois appellate court reversed a lower court decision on competitive bidding. The court held that an unsuccessful bidder could challenge a school board decision by alleging violation of the statutory provision requiring contracts be awarded to the lowest bidder and, if the sole reason that the board did not award a contract to an unsuccessful bidder was a desire to keep contract monies in the local area, that would indicate favoritism, which was a violation of statutory mandate.[35]

7.5b Construction Funding

In Massachusetts, a town appealed a judgment declaring state reimbursement of 50 percent of a new school's construction costs. The town requested 65 percent reimbursement pursuant to a short-lived measure for projects approved after January 1, 1971. The appeals court ruled that approval for this project took place prior to January 1, 1971, and was thus not eligible for the higher reimbursement.[36]

7.5c Prevailing Wages

As the result of an enforcement action by the California department of labor standards, a contractor filed a cross-complaint against a school district, alleging that it was not notified of the requirement to pay prevailing wages on district public works projects. The superior court and, subsequently, the court of appeals ruled that the district had properly notified the contractor and the contractor was fully responsible for its actions.[37]

---

[34] Medford Assembly of God v. City of Medford, 669 P.2d 1161 (Or. Ct. App. 1983).

[35] Cardinal Glass Co. v. Board of Educ. of Mendota Commun. Consol. School Dist. No. 289, 447 N.E.2d 546 (Ill. App. Ct. 1983).

[36] Town of Burlington v. Board of Educ., 448 N.E.2d 398 (Mass. App. Ct. 1983).

[37] Fanelli, Antuzzi, Bonacorsi Painting, inc. v. Santa Clara Unified School Dist., 190 Cal. Rptr. 515 (Cal. Ct. App. 1983). *See* S. Goldblatt and R. Wood, *Financing Educational Facility Construction: Prevailing Wage Litigation*, SCHOOL LAW UPDATE—1982 (NOLPE 1983).

7.5d Roofs

A Florida architect designed three schools in one county, all with similar roof systems. Built by 1970, all the roofs leaked, required extensive repairs, and had to be replaced. The school board sued the architect in 1977 after it spent years making repairs. The trial court ruled for the architect since a four-year statute of limitations had barred the claim. The court of appeal overturned the decision; the board's continual reliance on the architect to correct the problem had hidden the fact that the roofs were irreparable, thus deferring the limitations period. However, the supreme court agreed with the trial court and the dissenting appellate judge who stated: "The client should give up on his amiable, but bungling professional, get competent help and sue, or be forever barred from asserting his stale claim."[38]

In Kansas, a school district sued a roofing manufacturer for damages from a leaking roof. The manufacturer, in turn, filed a claim against the architects, the roofing contractor, and the manufacturer of the light-weight concrete insulating material. The supreme court affirmed the decision of the lower court holding that, until the roofing manufacturer had paid or was required to pay the district, it had no claim against the third-party defendants who were not parties to the manufacturer's contracts of guarantee with the district.[39]

A Michigan school district prevailed in arbitration over several construction companies for damages caused by a leaky roof on a new school building. In circuit court, the arbitration award was upheld. The court of appeals found that the roof was a "product" under a product-liability statute and that failure to use a product-liability statute of limitations defense in arbitration barred its use in court proceedings. A "continuity of enterprise" also barred the defense that the purchase of a corporation by another eliminated the liability of the purchased corporation. The circuit court decision was affirmed.[40]

A New York contractor had been hired in the late 1960s to install a roof on a school building. The school district brought an action for repair or replacement of the roof as well as compensatory or punitive damages. The supreme court graned the contractor's motion to dismiss the district's cause of action. The supreme court, appellate division, held that the damages contemplated by the district's complaint involved only economic loss. Recovery in tort, including negligence, was unavailable. The decision of the lower court was affirmed.[41]

---

[38] Kelley v. School Bd., 435 So. 2d 804 (Fla. 1983).

[39] Haysville Unified School Dist. No. 261 v. GAF Corp., 666 P.2d 192 (Kan. 1983).

[40] Fenton Area Pub. Schools v. Sorensen-Gross Constr. Co., 335 N.W.2d 221 (Mich. Ct. App. 1983).

[41] Queensbury Union Free School Dist. v. Jim Walter Corp., 463 N.Y.S.2d 114 (N.Y. App. Div. 1983).

A North Carolina school board sued a general contractor and subcontractor when the roof of its new school leaked. The board also sued the subcontractor for breach of its maintenance contract. The trial court ruled that the maintenance contract was not enforceable, but ruled in favor of the board on the construction contract. However, the board had furnished a defective design, so no damages were awarded. The first appeal affirmed the construction contract judgment, and the court also awarded the board damages for breach of the maintenance contract. A second appeals court found no error and affirmed the decision.[42]

In 1968, a Pennsylvania construction company had defaulted and failed to complete a high school building. Instead of paying off the performance bond, the surety found another company to complete the job. In 1977, the school authority and district brought an action against the surety to recover for defects discovered in the roof. The lower court entered summary judgment against the school, citing a statute of limitations. On appeal, the decision was reversed in favor of the school, due to an apparent contractual oversight in which no time limitation was placed on the surety's liability.[43]

7.5e Design and Performance

In South Dakota, a school district brought an action for breach of contract in the construction and maintenance of a swimming pool area. The supreme court, affirming a prior decision, ruled that a six-year statute of limitations barred the action for damages arising out of a deficiency in design, planning, supervision, inspection, or construction of an improvement to real property.[44]

In Massachusetts, an architect performed services for a city in connection with the construction of a school. Not satisfied with its remuneration, the architect brought suit seeking additional compensation. A master ruled in favor of the architect and the city appealed. The appeals court held that the architect was not entitled to interest prior to the payment due date and the fact that an appropriation for the architect's work had not been made when the contract was signed did not preclude a recovery when an appropriation was eventually made. This reversed a portion of the prior judgment and affirmed a portion of the award to the architect.[45]

---

[42] Burke Cty. Pub. Schools Bd. of Educ. v. Juno Constr. Corp., 306 S.E.2d 557 (N.C. Ct. App. 1983).

[43] Peters Twp. School Auth. v. United States Fidelity and Guaranty Co., 467 A.2d 904 (Pa. Commw. Ct. 1983).

[44] Mitchell School Dist. No. 17-2 v. Welfl Constr. Co., 329 N.W.2d 138 (S.D. 1983).

[45] Turiello v. City of Revere, 443 N.E.2d 1357 (Mass. App. Ct. 1983).

In Massachusetts, a subcontractor brought suit against a general contractor seeking reimbursement for the extra cost of using a more expensive acoustical coating material on a school. The contractor filed a third-party action against the city, alleging that the architect's disapproval of the less expensive material was arbitrary and wrong. The city counterclaimed against the contractor for the subcontractor's allegedly defective workmanship, which prompted the contractor to counterclaim against the subcontractor for recovery of any damages it might have to pay to the city. The trial court found in favor of the subcontractor and the contractor concerning the additional cost, and in favor of the city and the contractor concerning the workmanship. The appeals court vacated and remanded the decision of the trial court, holding that the architect's decision not to approve the use of an interior coating other than that described in the specifications was binding and final and that the trial judge's computation of damages was inaccurate.[46]

A New York school board contracted for the design, construction, and erection of some modular buildings. A subcontractor constructed the individual modules offsite and transported them to the site where they were to be placed on permanent foundations and a permanent roof applied. The field application of the roof and foundation alignment were to be performed by the contractor. Before the alignment of the modules or installation of the permanent roof had begun, there was a severe rainstorm and the modules suffered water damage. The board then sued the subcontractor and the architect, who in turn sued the contractor. The supreme court, appellate division, held that neither the architect nor the subcontractor was liable to the board for water damage, and it was the general contractor's obligation to protect the modules from the elements once the modules were delivered.[47]

In New York, a school district filed suit against a surety on a contractor's performance bond for damages resulting from defective construction of a high school athletic facility. The supreme court, appellate division, held that a prior judgment for the contractor against the district for final payment on the facility was res judicata as to the district's action against the surety.[48]

---

[46] Acmat Corp. v. Daniel O'Connell's Sons, Inc., 455 N.E.2d 652 (Mass. App. Ct. 1983).

[47] Jewish Bd. of Guardians v. Grumman Allied Indus., Inc., 464 N.Y.S.2d 778 (N.Y. App. Div. 1983).

[48] New Paltz Cent. School Dist. v. Reliance Ins. Co., 467 N.Y.S.2d 937 (N.Y. App. Div. 1983).

7.5f Contractor Claims

An Arkansas school district hired a contractor to perform renovations to a gymnasium. However, the contractor was not bonded as required by statute. Work was satisfactorily completed, but appellee, a material supplier, was not fully paid by the contractor. The supplier then discovered that the contractor was not bonded, but the contractor had already become insolvent. So the supplier filed suit against the district seeking a lien on the gymnasium. The chancery court imposed a lien, and the district appealed. The supreme court reversed and remanded the decision, stating that the duty was on the supplier to check public records for the bonding status of the contractor.[49]

In New York, a contractor performed work at a school under protest, reserving its right to make a claim for additional compensation. Four months after the final payment certificate was issued, the contractor presented the school board with a claim for additional compensation. The court of appeals ruled that the board could deny the claim because the governing statute barred the claim presentation beyond three months after completion.[50]

In Florida, a school board entered into a contract to build a new high school. The project overran its completion date and the contractor submitted claims for additional compensation. The board held a formal public hearing, dismissed the contractor's claims, and assessed liquidated damages. The court of appeal dismissed the contractor's appeal from the board's order, holding that the board lacked authority to so order and the contractor was "at liberty to pursue his cause of action in the appropriate judicial forum."[51]

In New York City, a contractor brought an action against the school board, seeking summary judgment on the question of liability for a delay of thirteen months in the construction of a high school. The basis for the action was the collateral estoppel effect of a prior action by a subcontractor against the board at the same project. The court held that the board was again responsible for the delay. The board appealed to the supreme court, appellate division, which stated that the contractor "failed to demonstrate that it stood in the same position as had the subcontractor." The court reversed the decision.[52]

In 1969, a Pennsylvania school district had contracted for plumbing work, allowing one thousand calendar days to complete the work. The district put the contractor on overtime for a portion of the contract, but the contractor was not satisifed with the amount of extra compensation and brought suit. The court of common pleas awarded the contractor additional compensation, but the superior court reversed the decision because "it is essential that the contractor prove that its original estimate of labor costs was accurate . . . so that 'total cost' measurement of damages is reliable." The contractor failed to prove the accuracy of its original estimate, so extra damages were deemed improper.[53]

---

[49] Beebe School Dist. v. National Supply Co., 658 S.W.2d 372 (Ark. 1983).

[50] Public Improvements, Inc. v. Board of Educ., 438 N.E.2d 876 (N.Y. 1982).

[51] Fasano v. School Bd., 436 So. 2d 201 (Fla. Dist. Ct. App. 1983).

[52] Caristo Constr. Corp. v. Board of Educ., 464 N.Y.S.2d 828 (N.Y. App. Div. 1983).

A Pennsylvania contractor brought an action to recover compensation from a school authority for extra work required on site development of a high school. The trial court entered a judgment for the contractor. The superior court ruled that the evidence did not support the school board's contention: change orders signed by the architect did not satisfy the contract requirement that additional work have written board approval. The evidence warranted a finding that there was a waiver of the written approval requirement. The award to the contractor was affirmed.[54]

7.5g Arbitration

A Connecticut contractor brought an action to correct an arbitration award over additions and alterations to a high school. The supreme court vacated the award because the arbitrators awarded items not submitted to them and did not award items that the school district had agreed to pay.[55]

A Kansas contractor claimed it was entitled to extra compensation because of change orders on a school construction project. The district claimed offsets for defects and delays in completion of the job. The construction contract specifically provided that all disputes arising under the contract should be decided by arbitration. The arbitrators found some items of dispute in favor of the contractor and other items in favor of the district. An award was confirmed for the contractor in district court, and the district appealed. The supreme court affirmed the decision, holding that the record revealed no fraud or arbitrary action or the denial of a fair hearing on the part of the arbitrators.[56]

In Montana, a mechanical subcontractor filed suit against a school district and its general contractor to recover payment for correcting a plumbing problem. In turn, the district brought an action against the architect for designing a faulty plumbing system. The supreme court affirmed the decision of the district court, which held that the architect designed an inadequate system and was therefore responsible for payment to the subcontractor for subsequent corrections. The architect claimed that, since the district did not first arbitrate, it could not seek reimbursement for the payment to the subcontractor. The court found that when there were issues of law or mixed issues of law and fact, arbitration was not mandatory without the consent of the parties involved.[57]

---

[53] John F. Harkins Co. v. School Dist., 460 A.2d 260 (Pa. Super. Ct. 1983).

[54] Thomas M. Durkin & Sons, Inc. v. Nether Providence Twp. School Auth., 460 A.2d 800 (Pa. Super. Ct. 1983).

[55] Waterbury Constr. Co. v. Board of Educ., 457 A.2d 310 (Conn. 1983).

[56] Johns Constr. Co. v. Unified School Dist. No. 210, 664 P.2d 821 (Kan. 1983).

A South Dakota construction company contracted to build a new school facility. During construction, the concrete supplier experienced a cement shortage, causing delays and additional costs to the contractor. The school district granted a time extension, but denied a request for extra cost reimbursement. The contractor then submitted a demand for arbitration and the arbitrator denied the claim for additional costs. The contractor appealed to the circuit court, charging the arbitrator with code violations. The circuit court ruled against the contractor and the supreme court affirmed, stating that the arbitrator did not violate code and the contract provided only for time extensions and was silent regarding claims for additional costs.[58]

A Maryland construction company and school board entered into a contract for renovation of a high school. When the company failed to complete the work on time, the contract was declared in default. The company filed for arbitration, alleging that the school district caused the delay and the board responded by bringing an action to stay the arbitration. The circuit court stayed the arbitration because the company had failed to present claims to the architect in a timely and proper fashion. The court of special appeals held that, since the company submitted affidavits that the parties had waived the requirement that claims be submitted to the architect, the trial court's decision to stay the arbitration because of its failure to present claims to the architect improperly adjudicated "the validity of underlying claims." The stay was thus vacated and the case remanded.[59]

In Massachusetts, an architect appealed the judgment of the superior court, which vacated an arbitration award in its favor. The appeals court held that, where two towns voted substantial sums for expenses to construct a regional high school but had placed a specific limit on amounts authorized and also refused to vote for further appropriations, the school district was not free to use "surplus revenue" for the additional construction costs.[60]

---

[57] Ace Plumbing & Heating, Inc. v. helena Flats School Dist. 15, 662 P.2d 1327 (Mont. 1983).

[58] L. R. Foy Constr. Co. v. Spearfish School Dist. No. 40-2, 341 N.W.2d 383 (S.D. 1983).

[59] Stauffer Constr. Co. v. Board of Educ., 460 A.2d 609 (Md. Ct. Spec. App. 1983).

A New York contractor demanded arbitration for work done on a school construction project. The school district instituted a counterclaim against the contractor, but arbitrators awarded judgment against the school "in full settlement of all claims." The district appealed to superior court, contending that the award was indefinite because it did not resolve the issues and disputes between the parties, nor did it include any data detailing how the award sum was computed. The supreme court and its appellate division both ruled that the arbitrator's award represented a bottom line resolution of all claims and need not include the formula used in calculating the award.[61]

7.6 SCHOOL CLOSURES

School district residents continue to challenge their boards' decisions to close schools due to declining enrollments, and the courts continue to uphold those decisions. School closures that further the goals of acceptable desegregation plans, whether court-mandated or not, also find court support.

7.6a General

In Iowa, district residents appealed a school board decision to close an elementary school. The supreme court affirmed the trial court's ruling in favor of the board, finding no abuse of guidelines or discretion. "Nor was the decision unreasonable, arbitrary or capricious."[62]

A Minnesota school district, in response to declining enrollments, decided to close some schools. Board meetings were held to discuss the issue, followed by public hearings and the establishment of a fact-finding committee. The supreme court held that the board complied with notice and hearing requirements of the school-closing statute and did not violate the open meeting law.[63]

In Illinois, a school board decided, due to decreasing enrollment and increasing costs, that it would be necessary to close one of its high schools and transfer its freshman students to other high schools. The appellate court, reversing the decision of the trial court against the board, held that the board acted within its discretion in making a decision without strictly applying the criteria of school closures; the board was not strictly bound by the rules; the board was not required to state why it did not follow the criteria and, thus, was not arbitrary in failing to do so; and the students had not established a loss necessary to invoke the estoppel doctrine.[64]

---

[60] Plymouth-Carver Reg. School Dist. v. David M. Crawley Assoc., Inc., 455 N.E.2d 990 (Mass. App. Ct. 1983).

[61] Reddick & Sons of Gouverneur, Inc. v. Carthage Cent. School Dist. No. 1, 459 N.Y.S.2d 156 (N.Y. App. Div. 1983).

[62] Keeler v. Iowa State Bd. of Pub. Instr., 331 N.W.2d 110 (Iowa 1983).

[63] Moberg v. Independent School Dist. No. 281, 336 N.W.2d 510 (Minn. 1983).

In Missouri, declining enrollment caused a district to close a high school. A neighborhood association approached the school board about opening a "community-sponsored" experimental education program. A plan was adopted and the board budgeted money for the program, which would begin in six months. The association began organizing and planning for a autumn opening. By June, other financial problems began to plague the district. Schools were closed, teachers were laid off, and the experimental program was cut. In September, however, association members entered the vacant school building and began teaching. The district sought an injunction against trespassing, and the association filed suit seeking specific performance of the original contract. The trial court ruled for the board, stating that the board had no right to promise opening an experimental school. Thus, no contract had existed. The ruling was upheld by the court of appeals.[65]

In New York, a petition was sought to declare void a vote of a school board closing an elementary school and to restrain the board from closing any school in the district. The petition alleged that no public notice of the meeting was given, a violation of the open meetings law. The supreme court dismissed the petition, finding that a subsequent board meeting had met the law's requirements and had cured the prior violation.[66]

Residents of a Pennsylvania school district filed a complaint against the school board alleging that the board had improperly voted to close an elementary school. The court of common pleas denied the residents' request for a preliminary injunction and ruled on the merits that the school board's action was improper. The school board appealed. The commonwealth court held that "it was improper to treat a hearing on application for preliminary injunction as a final hearing on the merits and as a final decree." The order was vacated and the case remanded.[67]

7.6b Desegregation

An Indiana board of school commissioners, after public hearings, closed a high school in accordance with court-ordered desegregation. Four students' parents filed suit against the board, arguing that the closure denied them "due process." The United States district court dismissed the suit because it was "an impermissible . . . attack on . . . the order in the desegregation case." The parents did not appeal, but instead filed an amended complaint to intervene in the desegregation case. The district court denied the filing of an amended complaint and the court of appeals affirmed.[68]

---

[64] Tyska v. Board of Educ. Twp. High School Dist. 214, 453 N.E.2d 1344 (Ill. App. Ct. 1983).

[65] Coalition to Preserve Educ. on Westside v. Kansas City School Dist., 649 S.W.2d 533 (Mo. Ct. App. 1983).

[66] *In re* Dombroske, 462 N.Y.S.2d 146 (N.Y. Sup. Ct. 1983).

[67] Crestwood School Dist. v. Topito, 463 A.2d 1247 (Pa. Commw. Ct. 1983).

In Louisiana, the United States district court received a remand to reconsider the closing of a predominantly black elementary school and the closing of a predominantly white elementary school, coupled with the transfer of students from these schools to an elementary and middle school in a community located midway between the closed schools. On remand the court readopted the plan after considering it in greater detail. One school board reappealled, desiring the reopening of the predominantly white school, a modern facility, and claiming the imposed remedy to desegregate was "commensurate with a constitutional violation." The court of appeals affirmed the plan, holding that "to transfer students from predominantly black and predominantly white schools . . . to schools . . . nine miles away from each was a reasonable exercise of discretion."[69]

In Louisiana, the United States court of appeals upheld a district court decision not to accept a school board's desegregation plan. The school district had perpetuated a "dual system" until 1980 when a district court-approved plan was ordered. The board had contributed to racial segregation by construction of thirty-six new schools built since desegregation efforts began in 1963, of which twenty-one served student bodies of one predominant race. The closing of schools also created a pattern of segregation by closing those schools that geographically were appropriate for economically transporting students. In 1981-82 the court's plan had achieved desegregation of elementary schools by closing some older or inefficiently small schools and pairing or clustering the remaining elementary schools.[70]

A Texas school district was proven, in several separate court cases, to have failed to meet its duty to dismantle its dual system. The district was first ordered to institute a desegregation plan in 1970. In 1982 the district was again ordered to submit a desegregation plan, which was subsequently adopted with the approval of the United States district court. A citizens' committee appealed, and the court of appeals found that there had been repeated failures to develop and institute effective desegregation plans. The case was remanded to the district court to reevaluate the plan and its alternatives, including the closing of "all-minority" schools.[71]

---

[68] Peacock v. Board of School Comm'rs, 721 F.2d 210 (7th Cir. 1983).

[69] Valley v. Rapides Parish School Bd., 702 F.2d 1221 (5th Cir. 1983).

[70] Davis v. East Baton Rouge Parish School Bd., 721 F.2d 1425 (5th Cir. 1983).

In Maryland, a class action suit was brought against a school board alleging violations of outstanding orders of a district court that had relinquished jurisdiction after supervised implementation of a desegregation plan. The complaint stated that three of the seven newest schools either began or evolved into one-race schools. It also alleged that the board closed schools without regard to desegregation factors. The United States district court found that, while the closures did not indicate any purposeful discrimination, they did reveal that more could have been done to eliminate all prior segregation. No new orders addressed the school closings, but guidelines were implemented regarding the construction of public schools.[72]

In Michigan, a desegregation action was brought involving three school districts in an attempt to eliminate the predominantly one-race standing in those districts. A complicated and expensive transportation plan was ordered, but the United States district court was not satisfied with the relative ineffectiveness of the plan. The court preferred, but could not enforce, a solution that the districts had contemplated. The voluntary desegregation plan consisted of sharing in the construction of "magnet schools." The court spoke at length of its support and endorsement of such a self-serving remedy.[73]

In Texas, a motion to approve amendments to a city's desegregation plan was granted by the United States district court. A portion of the plan included the closing of nine elementary schools. The court found that the closures would contribute "to the natural integration of the 'stand-alone' schools."[74]

7.7 PROPERTY TAXES

This new section reports cases of property tax assessments, exemptions, liens, and payments involving public, nonprofit, religious, and vocational school authorities.

In Arkansas, school districts brought an action against three counties to turn over monies received under the Payments in Lieu of Taxes Act. Arkansas had adopted a code in 1977 excluding school districts from those "units of local government" authorized to receive payments under the act. Although the districts claimed the act was "promulgated in excess" of its authority, the United States district court ruled in favor of the counties.[75]

---

[71] United States v. CRUCIAL, 722 F.2d 182 (5th Cir. 1983).

[72] Vaughns v. Board of Educ., 574 F. Supp. 1280 (D. Md. 1983).

[73] Berry v. School Dist. of City of Benton Harbor, 564 F. Supp. 617 (W.D. Mich. 1983).

[74] Flax v. Potts, 567 F. Supp. 859 (N.D. Tex. 1983).

A Pennsylvania taxpayer attempted to discharge or avoid a lien of taxes assessed against his real property by a school district. No one appeared at the hearing set for this matter but the court did not dismiss. Because this raised a recurring tax issue, the court wanted to "set forth its views: . . . [A] school tax . . . becomes a lien on real property when assessed . . . . No judicial action is required to bring the lien in question into existence."[76]

In Iowa, a vocational school appealed from a district court decision denying it a property tax exemption. The supreme court held that the school was not entitled to a tax exemption as a charitable institution on its leased property, in addition to the exemption it had as a school corporation for property it owned.[77]

In South Dakota, 327 landowners appealed the calculation of the assessed valuation and the taxable percentage imposed on their nonagricultural property. They contended that the higher taxable percentage on their property caused them to pay a disproportionate share of the county tax burden. The circuit court agreed. However, upon appeal, the supreme court ruled that the constitution and laws of the state allowed plural percentages for taxable valuations of different property classes within school districts.[78]

In Vermont, a property owner sought a declaratory judgment that his property was exempt from taxation. The owner contended that the property was operated as a nonprofit school for gymnastics and performing arts. The supreme court held that, since the school provided services the city was not required to provide, the trial court's finding that the property was not exempt would not be disturbed.[79]

In Illinois, a county treasurer sought judgment against a religious school to pay real estate taxes. The appellate court affirmed the decision of the lower court holding that the training association was used exclusively for "religious purposes" and, hence, was exempt from real estate taxes.[80]

A New York school district intervened in the reassessment of a parcel of land, on the basis that a reduction in its assessed value would result in an undue decrease in the district's tax base. The supreme court, appellate division, ruled that because the city, not the district, was liable for tax refunds, the district was not entitled to intervene in a tax assessment case.[81]

---

[75] Altus-Denning School Dist. No. 31 v. Franklin Cty., 568 F. Supp. 95 (W.D. Ark. 1983).

[76] Wilson v. Armstrong Cty. School Dist., 25 Bankr. 61 (W.D. Pa. 1982).

[77] Merged Area (Educ.) VII v. Board of Rev., 326 N.W.2d 310 (Iowa 1982).

[78] *In re* State Bd. of Equalization, 330 N.W.2d 754 (S.D. 1983).

[79] Ski-Lan Gymnastics v. City of Rutland, 465 A.2d 1363 (Vt. 1983).

[80] Evangelical Teacher Training Ass'n v. Novak, 454 N.E.2d 836 (Ill. App. Ct. 1983).

In 1976, the New York state legislature had enacted a declining ten-year tax exemption as a section of the real property tax law. It was for "real property constructed, altered, installed or improved . . . for the purpose of commercial, business or industrial activity." A county board of assessors wanted to cancel the tax exemptions for school tax purposes. An application to stop the county board from cancelling the exemptions was filed with the supreme court, which held that, since the resolutions reducing the tax exemption for school tax purposes were valid and effective prior to the date of the statute amendment, these exemptions could not be saved by the amendment.[82]

In New York, the terms of a foreclosure sale required the referee to pay from proceeds any taxes which "may become liens on the premises at the time of sale." School tax rolls were confirmed *prior* to the sale, but the fiscal year of the school district began *after* the sale. The supreme court granted a motion which, in effect, ruled that the taxes had not yet become liens. The appellate division ruled that this was a triable issue and denied the motion, remitting the matter back to the trial court for development of the facts.[83]

In New York, a school district passed a resolution granting a tax exemption to the owner of a resort hotel in return for the owner's offer to pay the assessed tax amount in lieu of taxes should casino gambling become legalized instate. Citizens brought an action against the district alleging that it had acted beyond the scope of its authority in passing the resolution. The supreme court, appellate division, held that the resolution was null and void as an attempt of the district to bargain away or sell its powers.[84]

A Pennsylvania school board appealed a tax board decision to place a school building on the tax rolls. The school board had rented the building to various charitable and religious organizations. The commonwealth court ruled that a building not used for its specified purpose, or one from which revenue is derived, should be subject to taxation.[85]

---

[81] Vantage Petroleum v. Board of Assessment Rev., 458 N.Y.S.2d 632 (N.Y. App. Div. 1983).

[82] Walker v. Board of Assessors of Nassua Cty., 460 N.Y.S.2d 726 (N.Y. Sup. Ct. 1983).

[83] Marine Midland Bank v. Greenblatt, 465 N.Y.S.2d 587 (N.Y. App. Div. 1983).

[84] Citizens to Save Minnewaska v. New Paltz Cent. School Dist., 468 N.Y.S.2d 920 (N.Y. App. Div. 1983).

[85] *In re* Souderton Area School Dist., 457 A.2d 194 (Pa. Commw. Ct. 1983).

In Pennsylvania, a nonprofit educational corporation with tax-exempt status applied for real estate tax exemptions for four residential properties situated on campus and occupied by school administrators and faculty. The board of assessment denied the applications for tax relief. The commonwealth court ruled that, absent a showing of actual and regular use of the residential properties for "educational functions and objectives," the property was not tax-exempt under the state's constitution.[86]

A Texas school district brought suit to recover delinquent ad valorem taxes on fifty-two miles of gas pipeline. The trial court entered a take-nothing judgment on the basis that the assessment was void because it was excessively high and resulted from a discriminatory plan or scheme. The appeals court ruled that nonpayment of an assessed tax was a prima facie case, and the tax was not in excess of the limit allowed by law. The judgment was reversed.[87]

In Texas, a school district and other taxing authorities brought suit against a taxpayer for three years' delinquent ad valorem taxes. The judgment in trial court was against the taxpayer, awarding taxes, penalties, interest, and attorney's fees. An appeal was based on the fact that two districts were in proximity. The taxpayer claimed that the plaintiff district was never given voter approval of a tax assessment. The appeals court agreed and reversed the portion of the judgment in favor of the district, affirming the remainder of the award.[88]

In Wisconsin, a school district filed a complaint against a second district to recover real property taxes collected on a parcel in the first district but erroneously paid to the second by the town clerk. Even though under statute the first district had a right to be reimbursed by the second for mispaid taxes, the first district failed to sustain its burden of proving timely notice when it presented no information concerning its date of discovery.[89]

7.8 PERSONAL INJURY

This new section reports cases of personal injuries claimed to result from negligent design, construction, or maintenance of school facilities and properties.

---

[86] *In re* Shipley School, 464 A.2d 692 (Pa. Commw. Ct. 1983).

[87] Hays Consol. Indep. School Dist. v. Valero Transmission Co., 645 S.W.2d 542 (Tex. Civ. App. 1983).

[88] Manges v. Freer Indep. School Dist., 653 S.W.2d 553 (Tex. Civ. App. 1983).

[89] Elkhorn Area School Dist. v. East Troy Commun. School Dist., 327 N.W.2d 206 (Wis. Ct. App. 1982).

In Florida, a parent sued the school board for the death of his eleven-year-old son who was struck by an auto while en route to a school bus stop. The plaintiff claimed that the board was liable for tort damages because it created a dangerous situation by negligently locating the bus stop. The court of appeals dismissed the case and the supreme court affirmed, ruling that the school's responsibility began when a student reached a bus stop and designation of a bus stop location was a planning-level decision immune to tort liability.[90]

In Maine, a student slipped and fell on an outside stairway in a public schoolyard. He claimed that the stairway was not properly maintained to be free of ice and snow. On appeal, the supreme court affirmed the trial court's decision that there was no substantial compliance with the Maine tort claims act notice of claim procedures.[91]

In Nebraska, an employee sought workers' compensation from his employer and a school for a fall from the roof of a school building. The workers' compensation court awarded full benefits plus a penalty and attorney's costs to the employee and dismissed the school from liability. The employer appealed and the appeals court set aside the awarding of the penalty and attorney's fee. The unsatisfied employer appealed to the supreme court to set aside all damages, and the court *reinstated* all damages as originally awarded to the employee.[92]

In New York, an eight-year-old child brought an action against a school board to recover for injuries sustained from an explosion. The child was playing with chemicals he discovered on school premises and matches found elsewhere. The court of appeals, affirming the decision of the lower courts, held that the school breached its duty for not recognizing that a serious hazard would arise if safeguards were not in place. This required that the chemicals be properly secured so that unsupervised access could not be readily obtained by children.[93]

In Utah, a trial court dismissed a local resident's complaint for injuries suffered when she slipped and fell on an icy sidewalk leading to the entrance of a school building. The supreme court reversed and remanded the decision holding that, if the board of education was found to be negligent, it would be held accountable for its conduct in the same manner as a private property owner.[94]

---

[90] Harrison v. Escambia Cty. School Bd., 434 So. 2d 316 (Fla. 1983).

[91] Faucher v. City of Auburn, 465 A.2d 1120 (Me. 1983).

[92] Franklin v. Pawley, 340 N.W.2d 156 (Neb. 1983).

[93] Kush v. City of Buffalo, 449 N.E.2d 725 (N.Y. 1983). In Louisiana, an eight-year-old was playing jacks during recess at the same time other students were rolling around a stand used for tetherball. The base of the stand was rolled over her fingers. Plaintiffs claim that the school board was negligent in allowing the stand to be used for anything other than its prescribed purpose. Similar minor instances had occurred previously. The trial court found the board liable regardless of how the accident occurred, and the court of appeals affirmed. Santee v. Orleans Parish School Bd., 430 So. 2d 254 (La. Ct. App. 1983).

[94] Gurule v. Salt Lake City Bd. of Educ., 661 P.2d 957 (Utah 1983).

In the District of Columbia, a young child was injured on the grounds of an elementary school by a cross-pole that fell off a fence. Her mother sought recovery from the alteration contractor and the school district. The two defendants filed cross-claims against each other for contribution, with the district also claiming indemnification. The court of appeals affirmed the trial court's decision in favor of the contractor on its claim. Since the school was aware of the dangerous condition the construction site posed, greater supervision was required to ensure the safety of its students.[95]

In Illinois, a student brought an action against a school district to recover for injuries sustained during a softball game in a physical education class. He contended that the field was improperly maintained and the district did not properly give instructions about the game. The appellate court held that the actions of the district and the teacher did not amount to willful and wanton misconduct and, when evidence was viewed in a light most favorable to the student, it still overwhelmingly favored the district.[96]

In Indiana, a student who was injured when he fell through a glass wall between entrance doors to a school brought an action against the school corporation and an architect to recover for his injuries. The circuit court granted summary judgment against the student. The court of appeal held that the ten-year statute of limitations on actions to recover damages for deficiencies in design, planning, supervision, construction, or observation of improvement to real property had expired and did not deny equal protection or violate the privileges and immunities clause or special laws' provision of the state constitution. The summary judgment order was affirmed.[97]

In Louisiana, a young student fought with another during recess in an "off-limits" area to avoid detection. During the altercation, she fell and broke her hip, which resulted in permanent disabling injuries. Her father sued the school board for negligence, citing inadequate supervision by her teachers and hazardous objects located on the ground that caused her to fall. The facts were highly disputed relating to the cause of her fall, but the trial court found that she merely lost her balance. The court of appeals affirmed.[98]

---

95. District of Columbia v. Royal, 465 A.2d 367 (D.C. 1983).

96. Weiss v. Collinsville Commun. Unit School Dist. No. 10, 456 N.E.2d 614 (Ill. App. Ct. 1983). In Pennsylvania a student baseball player suffered permanent loss of vision in his right eye when he was hit by a ball his coach had just batted. He contended that the school was liable because of its failure to exercise proper care in the custody and control of the baseball field. The appellate court affirmed the lower court's decision that the injury was not caused from improper or negligent maintenance of the field. Lewis v. Hatboro-Horsham School Dist., 465 A.2d 1090 (Pa. Commw. Ct. 1983).

97. Beecher v. White, 447 N.E.2d 622 (Ind. Ct. App. 1983).

98. Nicolosi v. Livingston Parish School Bd., 441 So. 2d 1261 (La. Ct. App. 1983).

In New York, plaintiffs were injured when their snowmobile collided into a bench located on a snow-covered baseball field owned by a school district. The wooden bench had been in place eleven years and was in good repair. The supreme court denied the district's motion for summary judgment, and the district appealed. The supreme court, appellate division, held that such a bench was not a trap or dangerous structure so as to require the district to guard or warn against it. The order was reversed, and the district's motion for summary judgment granted.[99]

In New York, plaintiff was injured in a fall while leaving an elementary school used as a polling place. The supreme court, appellate division, held that neither the town, the county board of education, nor the school district, acting as agents of the state in the election, were immune from liability for their alleged negligence.[100]

In New York, a student was injured when she struck a gymnasium wall while running a speed test. The student's mother brought suit against the board of education for negligent design of the course and failure to provide adequate instruction on its use. Reversing the decision of the trial court, the supreme court, appellate division, held that there was sufficient proof from which a jury could decide that the school was negligent.[101]

In Oklahoma, a couple brought suit against a school district for injuries sustained by the wife when she tripped on a metal grate protruding above an unlighted school walkway. The trial court dismissed the case due to a statutory exemption limiting liability imposed by the Political Subdivision Tort Claims Act. The court of appeals reversed the ruling, holding that the suit was not barred by the statutory exemption.[102]

In Phildelphia, a student brought suit against the school district alleging negligence in failing to secure school property and maintain adequate lighting. The girl was forcibly taken off an adjacent sidewalk through an unsecured school gate to an unlighted area of the school grounds and beaten. The common pleas court dismissed the complaint and the appellate court affirmed, holding that the district could not be held liable since violent criminal acts were not a reasonably foreseeable use of school property.[103]

---

[99] Mattison v. Hudson Falls Cent. School Dist., 458 N.Y.S.2d 726 (N.Y. App. Div. 1983). In Louisiana, a couple was walking on school property, returning from voting. As the wife stepped from the sidewalk to the parking lot, she tripped over a one-inch lip. The sidewalk had settled, leaving the curb it abutted higher than the sidewalk. The school board was sued for negligence, but the trial court found that the defect did not pose an unreasonable risk of injury to sidewalk users. The court of appeals affirmed. Tipton v. Bossier Parish School Bd., 441 So. 2d 453 (La. Ct. App. 1983).

[100] Pujolas v. Town of Tonawanda, 458 N.Y.S.2d 779 (N.Y. App. Div. 1983).

[101] Ehlinger v. Board of Educ., 465 N.Y.S.2d 378 (N.Y. App. Div. 1983).

[102] Smith v. Broken Arrow Pub. Schools, 665 P.2d 858 (Okla. Ct. App. 1983).

7.9 TRESPASS

In South Carolina, a minor was adjudicated a delinquent after three charges of trespassing upon public school property. He appealed, stating that the code under which he was convicted applied only to private property. The supreme court upheld the decision, stating that a trespass upon school property was a trespass "on the premises of another" as proscribed by the code.[104]

7.10 LANDLORD/TENANT

A Mississippi school board, as landowners of leased property, informed its leaseholders that it was necessary to increase their annual lease payments. The increase was predicated on an attorney general ruling that "receiving inadequate compensation for public trust property is a violation of the state constitution." A second letter explained that, if the lease was not renegotiated by a certain date, the lease could be made void in court. The leaseholders brought an action against the board alleging that its letters constituted a threat. The United States district court dismissed the action and the court of appeals affirmed.[105]

In New York City, a taxpayer sued the board of education to prevent alleged waste and the board brought an action to evict the taxpayer as a holdover tenant. The court of appeals ruled that the failure of the board to specify, in detail, its reasons for approving reacquisition and remodeling of a former school building did not constitute the fraud or illegality necessary to support the taxpayer's action. The board prevailed.[106]

7.11 HIGHER EDUCATION

This greatly expanded section reports higher education cases, organized by the same categories used in the school portion of the chapter. Also included are cases on estates, bankruptcy, income taxes, and nuisance.

---

[103] Vann v. Board of Educ., 464 A.2d 684 (Pa. Commw. Ct. 1983).
[104] *In re* Joseph B., 299 S.E.2d 331 (S.C. 1983).
[105] Frazier v. Lowndes Cty. Bd. of Educ., 710 F.2d 1097 (5th Cir. 1983).
[106] Mesvita of Forest Hills Inst. v. City of New York, 448 N.E.2d 1344 (N.Y. 1983).

7.11a General Board Authority

In 1973, a Wisconsin board of vocational education had made plans to construct new facilities for its technical college. The board and voters approved a $30 million referendum for funding of the project. Nearly five years passed before a site was selected. Meanwhile, a new statute was passed requiring voter approval for all "building program actions." New site selection included a plan to form a split-campus arrangement. Voters petitioned the court to require the board to seek voter reapproval under the new statute or enjoin further action on the new facilities until the statute was complied with. The trial court dismissed the petition on the contention that the project had already been approved by voters. On appeal, the court of appeals ruled that the new statute required this type program be resubmitted to voters before the project was further implemented.[107]

7.11b Zoning and Development

In Florida, a community college board filed a petition in eminent domain for the acquisition of several parcels of land. The landowner first learned of the condemnation in a local newspaper article. The trial court found that the governing statute required an attempt to be made to reach satisfactory agreement with a landowner before condemning his property. Since no such attempt was made, the case was dismissed and the decision was affirmed by the court of appeal.[108]

In Missouri, a university medical corporation possessing power of eminent domain received condemnation on four parcels of land belonging to a taxpayer. On the tenth day after the judgment became final, the university filed to abandon condemnation of one parcel and did not pay the assessment or take possession of that parcel. The taxpayer moved in trial court that the abandonment be denied because it was not filed within ten days of the verdict. The trial court dismissed the abandonment of the condemnation. The appeals court reversed the decision and granted the abandonment petition, ruling that the ten-day period began on finalization of the judgment, not the day of the verdict.[109]

In 1963, a Missouri college was granted a special use permit for several buildings. In 1981, the college asked the city for an amended permit to allow further expansion of the facilities. As per statute, two very lengthy public hearings were held. Some council members still had questions, so a public "executive session" was held where questions could be asked of college officials; no public participation was allowed. A neighborhood association filed suit against the city, claiming that new materials was introduced at the "executive session" that it was unable to rebut. The trial and appeals courts ruled that substantial evidence supported the actions of the city council and the special use permit was granted.[110]

---

[107] Ball v. District No. 4, Area Bd. of Voc.-Tech. Educ., 341 N.W.2d 707 (Wis. Ct. App. 1983).

[108] District Bd. of Trustees v. Allen, 428 So. 2d 704 (Fla. Dist. Ct. App. 1983).

[109] Washington Univ. Med. Cent. Redevelopment Corp. v. See, 654 S.W.2d 192 (Mo. Ct. App. 1983).

A Texas city filed an injunction to prohibit specific activities of a church that were in violation of a zoning ordinance. Zoning laws allowed the operation of a public or parochial school, but excluded colleges or trade schools. The church claimed that "college" activities were too closely related to "church" activities to be separated. The trial court ruled that the church could not operate its "college" and the appeals court affirmed the ruling.[111]

7.11c Building Design and Construction

An Alabama university signed a contract to construct a building. Retainage was set at 10 percent and, halfway to completion, was released to the contractor in exchange for a certificate of deposit of equal value in the name of both parties. The contractor defaulted, the university settled with the performance bond surety, and the surety released all title to any claims that could arise. The university then sued for ownership of the certificate. The trial court found that the contractor had received all funds due it and the university was sole owner of the certificate. The supreme court confirmed the judgment.[112]

A Florida community college filed a petition to stay arbitration of a dispute with a contractor. The circuit court denied the contractor's motion to transfer venue to the county of its sole place of business. The company appealed to the district court, which reversed and stated that the statute providing for venue in arbitration displaced general venue provisions.[113]

In Illinois, a college brought an action against a material supplier for negligent and/or fraudulent misrepresentation of roofing materials used in the construction of a new building and later found defective. On remand from the supreme court, both the circuit and appellate courts dismissed the college's action, based primarily on poor legal drafting of its complaint.[114]

---

[110] Greater Garden Avenue Area Ass'n v. City of Webster Groves, 655 S.W.2d 760 (Mo. Ct. App. 1983).

[111] Fountain Gate Ministries, Inc. v. City of Plano, 654 S.W.2d 841 (Tex. Ct. App. 1983).

[112] Rush v. Jacksonville State Univ., 439 So. 2d 9 (Ala. 1983).

[113] Hedron Constr. Co. v. District Bd. of Trustees, 420 So. 2d 393 (Fla. Dist. Ct. App. 1982).

In Illinois, a subcontractor filed an action against a general contractor for damages resulting from being delayed on work for a college. In turn, the general contractor filed a third-party action against the college and the architect for causing the delay. The appellate court, reversing the decision of the lower court dismissing the case, held that the action was not barred because of an earlier dispute between the college and the general contractor that was taken to federal court. The general contractor could state a third-party claim against the college and architect since, if the college was responsible for time delays, then this would have caused a chain reaction delaying the subcontractor.[115]

A New Jersey community college contracted for construction of several buildings. The roof subcontractor experienced construction problems, the college sued the contractor, and a settlement was reached. The college then brought suit against the subcontractor. The superior court decided that the action sounded in negligence, breach of warranty, and strict liability in tort, and was governed by a six-year statute of limitations that had expired.[116]

In New York City, a contractor agreed to erect, maintain, and lease a college's temporary dining hall. In return, the college would pay an annual rental and, upon expiration of the lease, had the option of purchasing the structure or paying for its removal. The college did not exercise the option properly and, after five years, the contractor filed suit for two years' back rent plus payment for the building. The college filed for dismissal of the suit because of untimeliness and lack of a cause of action. The dismissal was denied because the suit was not untimely and the contractor was deemed to have an interest in the premises.[117]

In North Carolina, a contract was written for stucco work at a university hospital. Upon completion, the contractor submitted a claim, which the university denied. As per contract, the contractor demanded arbitration. The university filed suit to prevent the arbitration, stating that the contractor was never licensed as a general contractor and thus was ineligible for arbitration. The trial court stayed the arbitration proceedings pending disposition in state court. The court then ruled in favor of the contractor, holding that it was not a general contractor, but a subcontractor, eligible for arbitration despite not having a license. An appeals court affirmed the decision.[118]

---

[114] Knox College v. Celotex Corp., 453 N.E.2d 8 (Ill. App. Ct. 1983).

[115] Case Prestressing Corp. v. Chicago College of Osteopathic Medicine, 455 N.E.2d 811 (Ill. App. Ct. 1983).

[116] Board of Trustees of Bergen Commun. College v. J.P. Fyfe, Inc., 457 A.2d 83 (N.J. Super. Ct. Law Div. 1982).

[117] Ames Contracting Co. v. City Univ. of New York, 466 N.Y.S.2d 182 (N.Y. Ct. Cl. 1983).

A Texas construction company and university contracted for the remodeling of two campus buildings. Delays developed for several months on one building and several years on the other. The contractor sued for additional funds, claiming that the university was responsible for the delays. The contractor also charged that it had been prohibited from bidding on other university work because of the delays and was due both actual and exemplary damages for that lost opportunity. The trial court awarded judgment to the contractor for both actual and exemplary damages. The appeals court disagreed and revoked the exemplary damage award. It also remanded the case for retrial, ruling that an explanatory instruction given by the trial court was an impermissible comment on the weight of the evidence.[119]

7.11d Property Taxes

In Georgia, a nonprofit organization formed to provide housing for a state college's fraternities and sororities brought suit to enjoin tax collection on its property. The trial court granted the injunction. The tax board appealed, questioning the idea that a sorority or fraternity was so closely tied to a university that it became entwined in its legal fabric. The supreme court affirmed the judgment that sororities and fraternities be granted exemption from ad valorem property taxation.[120]

The Ohio Supreme Court ruled that a university-owned plot leased as a private residence by individuals not affiliated with the university was exempt from property tax. The land was held in support of its academic mission and renting the house avoided the additional cost of demolition and allowed the building not to be left vacant.[121]

A New York court held that college-owned vacant lots qualified as tax-exempt because they were "an integral part of the future plans and development of the college." The supreme court, appellate division, affirmed the decision.[122]

---

[118] Duke Univ. v. American Arbitration Ass'n, 306 S.E.2d 584 (N.C. Ct. App. 1983).

[119] Board of Regents of N. Texas State Univ. v. Denton Constr. Co., 652 S.W.2d 588 (Tex. Ct. App. 1983).

[120] Johnson v. Southern Greek Housing Corp., 307 S.E.2d 491 (Ga. 1983). In Illinois, the supreme court considered the constitutionality of statutes granting property tax exemptions for parsonages, fraternity and sorority houses, and homestead improvements. A property taxpayer filed an action seeking to declare these tax exemptions unconstitutional. The supreme court held that the exemptions were constitutional. McKenzie v. Johnson, 456 N.E.2d 73 (Ill. 1983).

[121] Board of Trustees of Ohio State Univ. v. Kinney, 449 N.E.2d 1282 (Ohio 1983).

[122] Trustees of Union College v. Board of Assessment Rev., 457 N.Y.S.2d 971 (N.Y. App. Div. 1982).

In New York, an assessment by a city commissioner determined that the property on which a university's stadium was located was not entitled to a full tax exemption. The supreme court, appellate division, held that the determination of whether the stadium was entitled to a tax exemption for education could not be made without the disclosure of its financial records to discover the nature of its primary activities.[123]

In South Carolina, a foundation designed to benefit a private college was given real estate. The property was leased out for the entire period of ownership and proprety taxes were paid under protest. The foundation claimed that its link to the school gave the property exemption from ad valorem taxes. Both the trial court and the court of appeals ruled that the foundation was an entity separate from the college. Recovery of the taxes was denied.[124]

7.11e Personal Injury

In West Virginia, a child was injured in a fall from a theater stage on a university campus. His parents filed suit against the board of regents and others in the county where the accident occurred. A circuit court granted a motion dismissing the regents from liability, because the code states that "proceedings against a state agency may only be brought in the Circuit Court of Kanawha County." A remaining defendant unsuccessfully brought suit in Kanawha County against the regents seeking indemnity or contribution. The supreme court reversed this dismissal, stating that actions against the liability insurance of a state agency need not be brought in Kanawha County only.[125]

In California, a student brought an action against a community college district for damages after she was assaulted on a school parking lot. She claimed that the college had a duty to warn her and protect her against would-be assailants. In addition, she claimed that the college was liable for having maintained a "dangerous condition" on its property. The court of appeal held that the college did not have a duty to warn her and that the complaint failed to state a cause of action under the tort claims act.[126]

---

[123] Syracuse Univ. v. City of Syracuse, 459 N.Y.S.2d 645 (N.Y. App. Div. 1983).

[124] Citadel Development Found. v. County of Greenville, 308 S.E.2d 797 (S.C. 1983).

[125] Pittsburgh Elevator Co. v. West Virginia Bd. of Regents, 310 S.E.2d 675 (W. Va. 1983).

[126] Peterson v. San Francisco Commun. College Dist., 190 Cal. Rptr. 335 (Cal. Ct. App. 1983). In North Carolina, a cheerleader was raped and murdered off campus following a basketball game. Her estate brought suit against the college alleging negligence. The trial court granted the college's motion for summary judgment. The court of appeals affirmed, ruling that a landowner generally had no duty to protect one on his premises from criminal attack, unless such attack was reasonably foreseeable. The court found that the few scattered incidents of crime during the prior twenty-five years did not show a repeated incidence of criminal activity. Brown v. North Carolina Wesleyan College, 309 S.E.2d 701 (N.C. Ct. App. 1983).

In Florida, a parent brought suit on behalf of the estate of her deceased son. The boy was fatally injured in a fall while attempting to extricate himself from a university's stalled elevator car. The trial court dismissed the complaint against the state due to a failure to state a cause of negligence. The court of appeals reversed, ruling that liability did not depend upon whether the state's acts were a direct cause of the injuries, as long as those injuries were a foreseeable consequence of its conduct. The case was remanded on the question of foreseeability.[127]

In Missouri, a student brought suit for personal injuries suffered when she fell due to a hole in a campus sidewalk. The trial court dismissed her charges, holding that the law at the time of the accident barred the suit under the doctrine of sovereign immunity. On appeal, the student claimed that maintenance of a sidewalk was a proprietary function not protected by governmental immunities and, by accepting her tuition, the university had contracted to provide safe premises for her. The trial court's decision was affirmed by the court of appeals.[128]

In New York, a motorcycle rider was injured when he struck some railroad ties on university property. The rider claimed that the owner was negligent in permitting railroad ties to remain on the property and failing to warn of the danger. Also, the rider alleged that the presence of railroad ties constituted a nuisance. The supreme court, appellate division, held that the rider failed to sufficiently allege a public nuisance and to state a cause of action.[129]

In New York, a person walking on a community college's sidewalk slipped and fell on a patch of ice. He subsequently filed suit against the college for negligence. The supreme court, appellate division, dismissed the complaint and held that the plaintiff failed to provide sufficient evidence of negligence.[130]

In New York, a university student was struck by a falling metal closet in a public dormitory. An order from the court of claims granted the student's motion to dismiss the university's affirmative defenses. The supreme court, appellate division, reversed the decision, holding that neither a claim nor a notice of intention to file a claim was filed within the ninety days required.[131]

In New York, a student filed a claim for personal injuries while visiting an off-campus housing office. His injuries were sustained when his hand broke through a showcase upon which he was sitting while looking through listings. The supreme court, appellate division, affirmed the court of claims' dismissal, deciding that the state was not negligence in placing a glass showcase in the office. The showcase was not placed in the room as a place to sit; rather, chairs were there for that purpose.[132]

---

[127] Bryan v. Florida, 438 So. 2d 415 (Fla. Dist. Ct. App. 1983).

[128] Fowler v. Board of Regents for Cent. Missouri State Univ., 637 S.W.2d 352 (Mo. Ct. App. 1982).

[129] Andersen v. University of Rochester, 458 N.Y.S.2d 404 (N.Y. App. Div. 1982).

[130] Berna v. Monroe Commun. College, 459 N.Y.S.2d 191 (N.Y. App. Div. 1983).

[131] Brinkley v. City Univ. of New York, 460 N.Y.S.2d 53 (N.Y. App. Div. 1983).

In New York, a man brought an action against a university to recover damages for injuries received in an elevator accident. The trial court granted a motion denying the university the use of an engineering report prepared for it by an outside engineering consultant. The supreme court, appellate division, ruled that since the consultant's report was prepared for purposes of litigation and was without any factual material that could not be duplicated, the report need not be disclosed.[133]

In Texas, a student was injured when she tripped over a water hose lying across a university sidewalk. She brought suit against the university, alleging negligence in several respects. The trial court dismissed the case, based on a failure to state a cause of action under the Tort Claims Act. The court of appeals reversed the decision and remanded the cause for trial based on the university's failure to provide a safe place for its students—invitees—to walk.[134]

7.11f Landlord/Tenant

In the District of Columbia, tenants brought an action against their landlord, a university, for damages due to flooding. A clause in the lease relieved the landlord of any liability due to water damage. However, the court found a breach of such a warranty and reversed the ruling. It suggested that the tenants might obtain damages under another lease provision and remanded the case.[135]

In New York, the supreme court, appellate division, ruled that university-owned apartments that were vacant from 1971 to 1974 were thus "vacancy decontrolled" and exempt from rent stabilization.[136]

A New York City university's holdover proceeding was stayed by the civil court where its tenants had previously commenced a declaratory judgment action in supreme court, seeking protection under the Loft Law.[137]

In New York, a student was dismissed from a university for failing to comply with a notice to vacate university-owned housing. The student petitioned, challenging the determination, but it was dismissed in the trial court. Upon appeal, the supreme court, appellate division, held that the university's action against the student was in his capacity as a tenant and not as a student, so the university's expulsion of him was arbitrary and capricious.[138]

---

[132] Weissman v. State, 463 N.Y.S.2d 329 (N.Y. App. Div. 1983).
[133] Fedorcyzk v. New York Univ., 464 N.Y.S.2d 14 (N.Y. App. Div. 1983).
[134] Rawlings v. Angelo State Univ., 648 S.W.2d 430 (Tex. Civ. App. 1983).
[135] George Washington Univ. v. Weintraub, 458 A.2d 43 (D.C. 1983).
[136] Slaven v. Syracuse Univ., 459 N.Y.S.2d 3 (N.Y. App. Div. 1983).
[137] New York Univ. v. Molner, 464 N.Y.S.2d 984 (N.Y. Civ. Ct. 1983).

7.11g Estates

In Virginia, an action was brought against a university seeking the enforcement of a provision of a contract it held concerning a granted parcel of land. The deceased grantor had asked that certain conditions be met concerning the use of the land, and failure to do so would "convey the premises to . . . the surviving 'next of kin'." The United States district court dismissed the action brought by the grantor's sister for failure to include the other surviving family members. The sister appealed and the court of appeals reversed the dismissal because Virginia law did not applicably define the term "next of kin" and the complaint stated a cause of action.[139]

In Kansas, an action was brought to determine whether an inheritance tax was to be paid from the residue of a decedent's estate or apportioned among devisees and legatees as provided by statute. The court of appeals affirmed the decision of the lower court holding that the will did not clearly call for charging the inheritance taxes solely to the residue of the estate and that taxes were to be paid according to the statute.[140]

A Missouri university obtained a piece of real property pursuant to an order of distribution of an estate. The order was not recorded. The tax collection office sent tax bills to the estate, which forwarded them to the university. The university notified the assessor's office of the ownership change and requested that the property be removed from the tax rolls, as it was a tax-exempt institution. Bills continued to be sent and the property was eventually sold for delinquent taxes. The university sued the buyer and was awarded the property because the assessor's office had been notified of the ownership change before issuing the collector's deed. The decision was affirmed by an appeals court.[141]

7.11h Bankruptcy

In Vermont, a private college filed for relief under chapter 7 of the bankruptcy code, and a bank took possession of the real property as an indenture trustee. After several years, the college brought an action to determine its liability for property taxes after the trustee took possession. The bankruptcy court concluded that the college was responsible only for real estate taxes up to the date of foreclosure by the bank.[142]

---

[138] Harris v. Trustees of Columbia Univ., 470 N.Y.S.2d 368 (N.Y. App. Div. 1983).

[139] Fletcher v. Washington & Lee Univ., 706 F.2d 475 (4th Cir. 1983).

[140] Wendland v. Washburn Univ., 667 P.2d 915 (Kan. Ct. App. 1983).

[141] Washington Univ. v. Leachman, 641 S.W.2d 455 (Mo. Ct. App. 1982).

A Pennsylvania college ordered a scoreboard that was to be billed to its alumni association. The company was never paid, and the alumni association filed for bankruptcy. More than six months later, the company filed suit against the college in a court of common pleas. That court transferred the case to the commonwealth court, which transferred the complaint to the board of claims. The board ruled against the college, which appealed. The commonwealth court vacated the decision and awarded judgment to the college based on a six-month statute of limitations.[143]

7.11i Income Taxes

A Nebraska college president sued to recover federal income taxes paid for the fair rental value of his lodging furnished by the college. The United States district court held that the fair rental value was not excludable from his gross income. To be excludable, an employee was required to accept lodging as a condition of his employment, the lodging had to be furnished for the convenience of the employer, and the lodging had to be located on the business premises.[144]

7.11j Nuisance

An Ohio homeowner brought an action against a state university seeking damages for erecting a basketball court next to the homeowner's property. The court of common pleas dismissed the action for lack of jurisdiction. The court of appeals held that an action to enjoin a nuisance could be brought only in the court of claims. Also, an action alleging violation of a public duty for failing to comply with local and state regulations could be brought in either court.[145]

---

[142] Corporation of Windham College v. Town of Putney, 34 Cankr. 408 (D. Vt. 1983).

[143] Kutztown State College v. Degler-Whiting, Inc., 463 A.2d 1206 (Pa. Commw. Ct. 1983).

[144] Winchell v. United States, 564 F. Supp. 131 (D. Neb. 1983).

[145] Beatley v. Board of Trustees of Ohio State Univ., 446 N.E.2d 182 (Ohio Ct. App. 1982).

8

HIGHER EDUCATION

Robert M. Hendrickson with Dennis E. Gregory*

- Introduction 8.0
- Intergovernmental Relations 8.1
- Employees 8.2
  - Discrimination in Employment 8.2a
    - Title VI 8.2a(1)
    - Title VII 8.2a(2)
    - Title IX 8.2a(3)
    - The Equal Pay Act 8.2a(4)
    - Age Discrimination in Employment Act (ADEA) 8.2a(5)
    - Rehabilitation Act of 1973 8.2a(6)
    - Hiring Discrimination 8.2a(7)
    - Sexual Harassment 8.2a(8)
  - Nontenured Faculty 8.2b
    - First Amendment Freedom of Speech 8.2b(1)
    - Nonrenewal Procedures 8.2b(2)
    - Part-Time Faculty 8.2b(3)
  - Tenured Faculty 8.2c
    - Termination for Cause 8.2c(1)
    - Denial of Employee Privileges 8.2c(2)
    - Financial Exigencies 8.2c(3)
  - Collective Bargaining 8.2d
  - Administration and Staff 8.2e
- Students 8.3
  - Admission 8.3a
  - Nonresident Tuition 8.3b
  - Financial Aid 8.3c
    - Student Loan Default Collections 8.3c(1)
    - Student Aid Grants 8.3c(2)
  - First Amendment 8.3d
    - Freedom of Speech 8.3d(1)
    - Freedom of Association 8.3d(2)
    - Freedom of Press 8.3d(3)

  - Dismissal 8.3e
    - Disciplinary Dismissal 8.3e(1)
    - Academic Dismissal 8.3e(2)
  - Federal Regulations 8.3f
  - NCAA Regulations 8.3g
- Liability 8.4
  - Personal Injury 8.4a
  - Workers' Compensation 8.4b
  - Contract Liability 8.4c
- Antitrust 8.5

*Dennis Edward Gregory, Research Associate at the Center for the Study of Higher Education at the University of Virginia, assisted in the research and preparation of this chapter.

8.0 INTRODUCTION

Nineteen eighty-three saw a variety of cases heard in the court system. The Supreme Court was again active, hearing one case involving the authority of the federal government to regulate state employees and another concerning the authority of the Internal Revenue Service (IRS) to withhold tax-exempt status from a religious college found to be involved in racial discrimination. However, as the year closed, the higher education community was waiting for a decision on the Title IX case involving Grove City College.

The year also saw cases involving the use of multiple regression in sex discrimination and equal pay, along with the question of academic freedom in the release of tenure committee information in Title VII cases. Title VII also saw an interesting decision in a classified personnel case. Litigation concerning employment issues was heavy. Student issues of significant interest revolved around questions of nonresident tuition, commercial speech, funding of student newspapers, academic dismissal and personal injury. National Collegiate Athletic Association (NCAA) regulations of televised football games continued to advance through the courts toward what might be a Supreme Court ruling.

8.1 INTERGOVERNMENTAL RELATIONS

Several issues arose concerning federal authority versus state authority. For example, while the Constitution reserves education as a state prerogative, it does not preclude federal regulations under certain circumstances. A case on state and federal powers with significance for higher education tenure policy was before the Supreme Court.[1] This case challenged congressional authority to regulate state employees under the Age Discrimination in Employment Act of 1978 (ADEA).[2] As reported in the *Yearbook 1983*, the district court, citing *The National League of Cities v. Usery*,[3] found that the federal government's regulations under the commerce clause must look larger as a national interest when balanced against the defendant state's nominal interest in discrimination on the basis of age.[4] The district court's decision was that ADEA did not apply to state game wardens because of the state's defined powers under the tenth amendment.

The Supreme Court, on appeal, reversed the lower court decision. Justice Brennan, while citing the importance of the *National Cities* case, noted that the Court's ruling in *Hodel v. Virginia Mining and Reclamation Association*[5] was controlling. The Court applied the three-part test of *Hodel* to determine whether states should be immune under the tenth amendment from "an otherwise legitimate exercise of federal powers to regulate commerce,"[6] in this case through ADEA. The three-part test asked the following questions: first, does the statute regulate the state as a state; second, does the statute address matters indisputably attributes of state sovereignty; and third, does the state compliance with the statute directly impair the state's ability to structure integral operations in areas of traditional state governmental functions? The Court found that the physical preparedness of game wardens, a state governmental interest, is not impaired by ADEA. The Court reasoned that ADEA allows the state to use age as a criteria for game warden retirement if it can show that age is a "bona fide occupational qualification" for the job. In reaching this decision, the door was left open to the question of how the three-part *Hodel* test might be applied to other state employees. Applying ADEA to tenured faculty, for example, may affect the financial integrity of the institution and the state's ability to redirect educational programs, thus yielding an interesting question for future litigation.

In another case the Supreme Court addressed the relationship between the federal government and private institutions.[7] At issue specifically was the question of whether the IRS had the legislative and constitutional authority to deny tax-exempt status to Bob Jones University and Goldsboro Christian School. The IRS denied tax-exempt status to Bob Jones University, a fundamentalist-oriented college, because it sponsored racially discriminatory policies through its regulation of student life and admissions policies. Bob Jones University challenged IRS authority within the Internal Revenue Code as established by Congress. Further, Bob Jones University alleged that even if the IRS had congressional authority, the free exercise and establishment clauses prohibited the IRS from enforcing these regulations when institutional policies were resulting from religious beliefs. Chief Justice Burger, writing the opinion, established that Congress intended that the IRS grant tax-exempt status only to those organizations that "serve a public purpose and not be contrary to established public policy."[8] Further, he noted that it has been long established that the free exercise and establishment clauses are not absolute prohibitions, especially where religious practices violate accepted public policy.[9] The governmental interest at stake was compelling. The eradication of racial discrimination is a public policy that superseded religious beliefs. Thus, the IRS may deny tax-exempt status to private religious schools that discriminate on the basis of race.

---

[1] EEO[illegible]. Wyoming, 103 S. Ct. 1054 (1983).

[2] 29 U.S.C. § 621 (1978).

[3] 426 U.S. 833 (1975).

[4] *See* The Yearbook of School Law 1983 (P. Piele, ed.) [hereinafter cited as Yearbook 1983] at 293; EEOC v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981).

[5] 452 U.S. 264 (1981).

[6] *Id.* at 287.

[7] Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983). *See* The Yearbook of School Law 1982 (P. Piele, ed.) [hereinafter cited as Yearbook 1982] at 253-54.

8.2 EMPLOYEES

The job market and financial conditions continue to be reflected in the voluminous number of cases in this area. The employee cases have been organized under several broad topics: alleging discrimination under federal regulations (Title VI and VII of the Civil Rights Act, Title IX of the Education Amendments, the Equal Pay Act, Age Discrimination, and P.L. 94-142) and in hiring; complaints involving nontenured faculty; complaints from tenured faculty; and collective bargaining cases. This edition of the *Yearbook* adds a new section for cases involving administrators and classified personnel.

8.2a Discrimination in Employment

8.2a(1) Title VI

Students, faculty, alumni, and prospective students filed a class action suit alleging violations of Title VI of the Civil Rights Act of 1964.[10]

---

[8] *Id.* at 2026.

[9] *Id.* at 2034.

[10] 42 U.S.C. § 2000(d) (1964).

The plaintiffs asked for declaratory and injunctive relief against the United States Department of Education (DOE), the Pennsylvania Board of State College and University Directors, and the President and Board of Trustees of Cheyney State College, a predominantly black institution. Pennsylvania was found by HEW to be one of ten states not in compliance with Title VI in 1969. In 1973 in *Adams v. Richardson*,[11] Pennsylvania was one of several states ordered to develop desegregation plans. In 1981 DOE notified Pennsylvania that its desegregation plan was inadequate and ordered the state to submit a new proposal. The Third Circuit upheld the district court's order "staying proceedings" in this suit since administrative action was still pending through the United States Office of Education.[12] The circuit court acknowledged that the district court could have ordered a writ of mandamus in this case but did not err in issuing a stay since administrative action was pending. The circuit court also ruled that the stay was not appealable since the stay was not final and the lower court had ordered the defendants to report in ninety days on the administrative procedures negotiated between DOE and the state of Pennsylvania.

8.2a(2) Title VII

Title VII of the Civil Rights Act of 1964[13] was the basis of a number of cases involving charges of discrimination against females in employment. However, several cases alleged reverse discrimination in employment. This section will lead off with controversies concerning academic freedom in tenure decisions and the use of multiple regression in Title VII cases.

A significant Title VII case in 1983 involved the release of information on tenure decisions to the Equal Employment Opportunities Commission (EEOC). This case is in contrast to a case reported in the *Yearbook 1982*.[14] In the *Dinnan* case the court opened up the deliberations of tenure committees to full disclosure where questions of discrimination had been raised. The *Yearbook 1983* contained a case that stated that absent reasons for not granting tenure, the deliberations of the tenure process must be opened to investigation.[15] This year's case involved the University of Notre Dame where the court took a more guarded and protective approach to the concepts of academic freedom and institutional prerogatives in granting tenure to faculty.[16]

---

[11] 356 F. Supp. 92 (D.D.C. 1973), *aff'd as modified*, 480 F.2d 1159 (D.C. Cir. 1973).

[12] Cheyney State College Faculty v. Hufstedler, 703 F.2d 732 (3d Cir. 1983).

[13] 42 U.S.C. § 2000(e) (1964).

[14] *See* YEARBOOK 1982 at 264; *In re* Dinnan, 661 F.2d 426 (5th Cir. 1981).

[15] *See* YEARBOOK 1983 at 305; Gray v. Board of Higher Educ. CUNY, 692 F.2d 901 (2d Cir. 1982).

[16] EEOC v. University of Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983).

The *Notre Dame* case involved a black economics professor who was denied tenure and filed a complaint with EEOC alleging discrimination. EEOC demanded that the university provide the personnel files of the plaintiff and all other employees, past and present, of the economics department. The university refused to supply the information unless names and other identifiable information were removed from these sensitive and confidential files. They also asked EEOC to guarantee the confidentiality of these files by signing a nondisclosure agreement. This impasse resulted in action before the district court. The district court ordered the university to make the complete personnel records without redactions available to EEOC.[17] Further, they reduced the scope of the EEOC request by stipulating that only those personnel files of former and current economics department faculty whose tenure status was reviewed during the period of the plaintiff's eligibility for tenure be provided. They also negated the university's request for a nondisclosure agreement.

The circuit court, citing the need to balance the institution's prerogatives to select faculty and EEOC's right to pursue a charge of discrimination, set some narrow standards subject to court supervision under which EEOC could procure the desired information. Citing the need to protect academic freedom and the concepts of peer review, the court ordered the university to provide the personnel files of the faculty outlined under the district court's provision, after the university had redacted any information such as name, address, institutional affiliation, and "other identifying features (e.g., publications, professional honors)" that would identify the evaluating scholars found in the files. Any challenge by EEOC to the redacted information would be reviewed by the court. Further the release of information would be particularized because of the sensitive nature of the peer review process in academic institutions. The court used the term "particularized need" to describe the need to limit the released information to those facts directly related to a specific issue outlined by EEOC. This analysis must be done each and every time EEOC sought additional privileged information. Further, the circuit court ordered the district court to issue a protective order assuring that the information given to EEOC would be released only to persons directly involved in this action.

Several cases used statistical evidence (multiple regression) to prove discrimination, but had differing results. In a New York Title VII case the question of statistical evidence proved to be significant in a ruling favorable to the plaintiffs.[18] A class action suit by females charged that

---

[17] EEOC v. University of Notre Dame Du Lac, 551 F. Supp. 737 (N.D. Ind. 1982).

[18] Melani v. Board of Higher Educ. of City of New York, 561 F. Supp. 769 (S.D.N.Y. 1983).

City University of New York (CUNY) had discriminated against women in awarding salaries. The plaintiffs used multiple regression analysis, which allowed the analysis of a number of factors (independent variables) on a particular dependent variable. Citing the Supreme Court, the district court held that multiple regression was sufficient to establish a prima facie case. Defendants unsuccessfully argued that the statistics alone should not establish a prima facie case. They presented a number of criticisms of the plaintiffs' multiple regression analysis. First, they criticized plaintiffs' study for not distinguishing among different nonfaculty titles. The court held that this problem was "not pervasive" and that the flaw did not detract from the findings. Second, defendants' criticism was that the multiple regression analysis did not include a measure of faculty academic productivity (such as publications, research, and service) prior to and during employment at CUNY. The court held that, since measures of faculty productivity, "may incorporate the effects of discriminatory decisions" rather than actually measuring productivity, plaintiffs should not be required to include such analysis.[19] Further the court found that the study included preemployment academic productivity by including three variables, "age, degrees and years between degrees."[20] The final criticism was that the study failed to account for market conditions characteristic of different departments. The district court ruled that this omission did not negate the value of the study. Since the defendants were unable to show inaccuracy and insignificance of the plaintiffs' multiple regression analysis and failed to provide other reasons for the discrimination, they failed in their burden of proof. Therefore, the court found in favor of the plaintiffs. However, this ruling is different from the ruling on multiple regression by this same court several months later in *Sobel*, which will be discussed under the Equal Pay Act.[21]

Another case involving statistical analysis was a class action suit by former and current female employees and applicants for employment at the University of Rhode Island.[22] The women alleged that the university had discriminated on the basis of sex in recruiting, hiring, compensation, tenure, promotion, termination, and contract nonrenewal. The defendant institution asked the district court to grant summary judgment since a statistical analysis using multiple regression found no statistical basis for a finding of discrimination. The plaintiffs countered with a critique of the university's study. The district court, noting that a summary judgment should be awarded only if the defendant can show no genuine issue exists in material facts, denied the summary judgment. They found that the plaintiffs had "made it abundantly clear" that issues of fact were genuine.[23] Further, the court found it would be remiss, even absent the plaintiffs' critique of defendant's statistical study, if it did not subject the statistical evidence to indepth analysis at trial. The court stated that statistical evidence, although important in discrimination cases, was "neither irrefutable nor necessarily definitive."[24]

---

[19] *Id.* at 778.

[20] *Id.*

[21] Sobel v. Yeshiva Univ., 566 F. Supp. 1166 (S.D.N.Y. 1983).

[22] Peng-Fei Chang v. University of Rhode Island, 554 F. Supp. 1203 (D.R.I. 1983).

The final multiple regression case used statistical evidence to allege that the employer's reasons for not employing the female were a mere pretext for discrimination.[25] A female employee of a state research foundation was removed from a research analyst's position to a previously held position because of cutbacks in the foundation's budget. She was later bypassed for other research analyst positions. The district court applied the "disparate treatment" theory and found no basis to substantiate the claim of discrimination in employment based on sex. The circuit court of appeals, noting that under civil procedures a "finding of fact may not be set aside unless clearly erroneous,"[26] affirmed the district court decision. The plaintiff established a prima facie case of potential discrimination. The employer provided a rationale within the prerogatives of management, which on their face were free of discrimination. The Second Circuit found that statistics on previous hiring practices alone would not support the allegation that the employer's reasons for not hiring the plaintiff were a mere pretext to discriminate on the basis of sex.

A case that could have far reaching implications for colleges and universities involved classified employees.[27] A class action suit was brought by black and female hourly employees but was later expanded to include clerical employees. The district court found that several employee practices had a "disparate impact" on blacks and women. First, certain job qualifications were found not to be related to the specific job. For example, the requirement of a high school diploma was established because the persons holding the jobs in 1972, the year the requirements were established, had degrees, but the defendants could not show the job relatedness of those requirements in some positions. Second, the classified pay plan for hourly employees created wage differences between the lower paid blacks and women and white employees. The university was unable to justify these discrepancies. Third, the implementation of subjective job qualifications for promotion and hiring had effectively channeled blacks and women into low-skilled manual labor and clerical hourly positions, whereas whites filled salaried office work or skilled craft positions. The Fifth Circuit Court affirmed the findings of the district court but remanded the case for a determination of intent to discriminate. The court ruled that Title VII liability under the "disparate treatment" theory required proof of intent to discriminate prior to awarding damages. The case could provide significant guidance in establishing equitable policies for classified and clerical personnel and should be reviewed carefully.

---

[23] *Id.* at 1205.

[24] *Id.* at 1206.

[25] Sweeney v. Research Found. of State Univ. of New York, 711 F.2d 1179 (2d Cir. 1983).

[26] FED. R. CIV. P. 52(a).

[27] Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608 (5th Cir. 1983).

One case illuminates the differences between "disparate impact" and "disparate treatment" claims.[28] An unsuccessful black candidate for a position at the State Board of Higher Education in Oregon filed a Title VII claim. The district court granted a summary judgment to the defendant based on the plaintiff's inability to show a lack of discriminatory intent. On appeal, the Ninth Circuit reversed and remanded the case with instructions that the plaintiff's Title VII claim be reviewed in light of both the "disparate impact" theory and the "disparate treatment" theory.[29]

The District Court of Oregon (*supra* note 28) reviewed the case and found that the plaintiff failed to establish a prima facie case under the "disparate impact" theory and failed to show that the defendant's reasons for not employing him were a mere pretext under the "disparate treatment" theory. Under "disparate impact" theory a prima facie case is established by the plaintiff showing that "facially neutral employment practices have a significant discriminatory impact on a group protected by Title VII." Specifically, the plaintiff charged that the criterion of good written and oral communication had a substantial discriminatory effect on black applicants. Plaintiff's arguments, relying solely on the fact that he was not hired, were insufficient to support a prima facie case of "disparate impact." Under the "disparate treatment" theory a prima facie case is established by showing that the plaintiff (1) is a member of a Title VII protected group, (2) was qualified for the position sought, and (3) was not hired. The establishment of a prima facie case results in the burden shifting to the defendant. The defendant's reasons—the plaintiff was less qualified than others and lacked oral and written skills—were considered appropriate. The plaintiff failed in his burden to show that the reasons were either inaccurate or were a mere pretext for discrimination. While the judge noted that he may disagree with some of the judgments made by the selection committee, they were within the employer's prerogatives in selecting candidates and were free of Title VII violations.

---

[28] Peters v. Lieuallen, 568 F. Supp. 261 (D. Or. 1983).
[29] Peters v. Lieuallen, 693 F.2d 966 (9th Cir. 1982).

In another Title VII case, a white female filed a Title VII claim of employee discrimination in her removal from a predominantly black institution.[30] At trial the District Court of the Southern District of Georgia found that the plaintiff could not file a claim against individual officials under Title VII, but rather against the board of regents, the true employer. The Eleventh Circuit Court of Appeals upheld the decision of the district court. The plaintiff had established a prima facie case under Title VII. The institution's reasons for dismissal—incompetence and lack of student rapport—were a pretext for discrimination. The charges were found to be motivated by other faculty actions that were racially motivated. The facts indicated that the institution's president, on investigation of the charges, found them to be baseless. The plaintiff was able to prove that the charges were solely motivated by race and that race was a significant factor in the origin of the charges and the final decision to dismiss.

Another Title VII case involved a staff person who was responsible for investigating charges of discrimination at the institution and reporting to the administrative vice-president options for their resolution.[31] However, the dismissed female had repeatedly superseded the responsibilities of this position and attempted to become an advocate for the employees and had released information to the press. The circuit court found that such actions were not protected by the first amendment, since they were outside the scope of plaintiff's job and stifled established procedures of the institution for resolution of claims. This evidence of insubordination and exceeding the responsibilities of her position was an adequate reason to defeat a Title VII claim. Further, the plaintiff failed to establish employee discrimination based on her removal to a new job and the upgrading of a position she formerly held. Under this claim she failed to establish a prima facie case based on retaliation for her Title VII suit.

In several cases the plaintiffs either failed in their burden of proving discrimination[32] or failed to prove that the institution's reasons were a mere pretext for discrimination.[33] In another case involving reverse discrimination, the Eighth Circuit Court[34] affirmed a district court decision[35] that found the plaintiff to have been discriminated against in hiring in violation of Title VII and the Age Discrimination in Employment Act. However, the Eighth Circuit reversed the portion of the decision dealing with back pay, saying that the district court had failed to calculate back pay on a year-by-year basis. Finally, in a New Jersey case, the federal district court found that the charges brought under Title VII and New Jersey discrimination laws were frivolous.[36] The court ordered the plaintiff to pay the defendant university for attorney's fees and costs totalling $24,875.52.

---

[30] Lincoln v. Board of Regents of Univ. Sys. of Georgia, 697 F.2d 928 (11th Cir. 1983).

[31] Hamm v. Board of Regents of State of Florida, 708 F.2d 647 (11th Cir. 1983).

[32] *See* Black v. Brown Univ., 555 F. Supp. 880 (D.R.I. 1983); Kureshy v. CUNY, 561 F. Supp. 1098 (E.D.N.Y. 1983).

8.2a(3) Title IX

While the *Grove City College v. Bell*[37] case was argued before the Supreme Court, a similar Title IX case, *Hillsdale College v. Department of HEW*, reached the Supreme Court Docket on appeal from the circuit court.[38] Hillsdale College refused to execute the Assurance of Compliance form required by HEW under Title IX regulations. HEW alleged that this private nonsectarian, coeducational college was required to conform to Title IX regulations since students received either National Direct Student Loans (NDSL), Basic Educational Opportunity Grants (BEOG), Supplementary Educational Opportunity Grants (SEOG) or Guaranteed Student Loans (GSL). An Administrative Law Judge (ALJ) ruled that receipt of funds under these programs by students at the institution made the institution a "recipient" of "federal financial assistance" under Title IX. Therefore the institution is a "program" within the meaning of Title IX.

On appeal, the Sixth Circuit, after reviewing the legislative history and citing *North Haven v. Bell*,[39] affirmed in part and reversed in part the ALJ decision. They held that BEOGs, NDSLs, SEOGs and GSLs given to students constituted "federal financial assistance," and therefore that Hillsdale College was a "recipient" under Title IX. Citing *North Haven*'s "program specific" ruling, they found that federal student financial aid does not make the institution a program within Title IX, but that only the student grants and loan program (the financial aid office) comes under the authority of Title IX. Further, the court held that absent a charge of discrimination, HEW could cut off funds for failure to complete an assurance of compliance form. However, the assurance of compliance would apply only to the regulated program, and, therefore, the requirements as applied to the total institution were invalid.

---

[33] McMillan v. Rust College, 710 F.2d 1112 (5th Cir. 1983).

[34] Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983).

[35] *See* YEARBOOK 1983 at 299, Leftwich v. Harris-Stowe State College, 540 F. Supp. 37 (E.D. Mo. 1982).

[36] Brown v. Fairleigh Dickinson Univ., 560 F. Supp. 391 (D.N.J. 1983).

[37] *See* YEARBOOK 1983 at 295, Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982), *argued* 52 U.S.L.W. 3433 (U.S. Dec. 6, 1983).

[38] 696 F.2d 418 (6th Cir. 1982); Supreme Court Docket No. 82-1538.

See YEARBOOK 1983 at 294, North Haven Bd. of Educ. v. Bell, 102 U.S. 1912 (1982).

While the circuit court in *Grove City College* (*supra* note 37) found that the institution was a program because of the receipt by students of federal student financial aid, *Hillsdale College* took a more limited view. Both cases are before the Supreme Court and either of these cases could point the direction the Court will take as it releases its decision in 1984.

8.2a(4) The Equal Pay Act

The Equal Pay Act (EPA) (*supra* note 21) regulates discrimination on the basis of sex in the award of salaries and other employee benefits. As was discussed under Title VII, multiple regression as evidence is also at issue in EPA cases. This year the Southern District Court of New York found multiple regression analysis sufficient to reach a finding of discrimination under Title VII despite deficiencies raised by the defendants.[40] Since similar standards and methods of analysis are used in Title VII and EPA cases, it is interesting to note that the same court ruled differently in another multiple regression case three months later.[41] In a case involving doctors in the Medical School at Yeshiva University, using the same arguments employed by the defense in the earlier case, Yeshiva University persuaded the court that multiple regression did not establish a prima facie case for sex discrimination in pay. The defense cited several deficiencies in the regression analysis. They noted that the multiple regression analysis used by the plaintiffs did not take into account faculty productivity, differentials in starting salaries based on productivity, and market value factors of different positions. The key difference between this case and the earlier case appears to be that the defense conducted its own multiple regression analysis using these factors and presented them to the court. The defense also was able to effectively show that their promotion and tenure criteria that were used to determine rank, the main measure of productivity in their regression analysis, was "not contaminated by elements of sex discrimination."[42]

---

[40] Sobel, *supra* note 21.

[41] Melani, *supra* note 18.

[42] Sobel, *supra* note 21, at 1180.

The most novel Equal Pay Act case this year involved the question of whether the Equal Pay Act can be applied to a church-controlled college. In this case, the district court, while ruling that the plaintiff did not support a claim of discrimination under EPA, found that the Fair Labor Standards Act (FLSA) and EPA applied to church-affiliated colleges.[43] The court acknowledged the Supreme Court ruling in *NLRB v. Catholic Bishops of Chicago*, in which the Court found that the National Labor Relations Act (NLRA) did not apply to lay teachers in church-operated schools.[44] However, the district court found a number of exceptions in reaching a contrary ruling concerning FLSA as amended by EPA. The first exception was that the decades of judicial interpretations of FLSA, not NLRA, govern here. However, in review of judicial precedent, the Court failed to cite cases that apply FLSA to church-related institutions. The second exception cited was that this court cannot construe EPA to exclude employees of the college. The college was an "employer" within the meaning of the statutes. The third exception was that Belmont College was a college that provided a strong religious environment for learning as opposed to the schools in *Catholic Bishops* that "provide a religious atmosphere and seminary or required religious training."[45] The final exception was the *Catholic Bishops* test was not applicable since the EPA interpretation accepted by this court was not, in their view, a violation of the Constitution. This case raises some serious questions that could eventually reach the Supreme Court.

In a Kansas EPA claim, the court noted that the EPA has a time limitation of three years from the time plaintiff becomes aware of the discrepancy in pay.[46] Therefore, plaintiffs' claims prior to October 1978 were time barred, but discrimination claims subsequent to that date were still alive and should be reviewed by the court.

Several cases emerged involving charges of reverse discrimination in the application of court-ordered salary equity plans for females. An Illinois case involved a male plaintiff who charged that the university's equity formula resulted in females receiving higher salaries simply on the basis of gender, in violation of the Equal Pay Act.[47] The university, operating under an Office of Civil Rights order, developed a salary equity plan for females that was based on a "university-wide male average formula" without considering fair market factors. The result was that in departments with lower than average salaries females were now making more than equivalent "time" and "rank" males as a direct result of the equity formula. The district court, citing *Regents of the University of California v. Bakke*[48] and *United Steelworkers of America, AFL-CIO v. Weber*,[49] argued that a male could be discriminated against temporarily to right a previously wronged "class" based on an administrative finding of salary discrimination. The district court acknowledged its disagreement with a similar case in Pennsylvania.[50] In the Pennsylvania case, the district court found under similar circumstances that the salary equity plan put males under a permanent salary disadvantage in violation of EPA. The court ordered the university to revise its plan to eliminate gender-based discrimination. This more narrow view, based on *Weber*, holds that discrimination can continue only where it is unavoidable to right a previous wrong.

---

[43] Russell v. Belmont College, 554 F. Supp. 667 (M.D. Tenn. 1982).
[44] 440 U.S. 490 (1979).
[45] Russell v. Belmont College, 554 F. Supp. 672 (M.D. Tenn. 1982).
[46] Billings v. Wichita State Univ., 557 F. Supp. 1348 (D. Kan. 1983).
[47] Ende v. Board of Regents of N. Illinois, 565 F. Supp. 501 (N.D. Ill. 1983).

8.2a(5) Age Discrimination in Employment Act (ADEA)

While the scope of federal authority under ADEA was discussed in the section on Intergovernmental Relations, an actual Age Discrimination in Employment Act claim was adjudicated in an Oklahoma case.[51] A fifty-nine-year-old woman technician in the Geological Survey Office applied for but was not hired as the chief cartographic draftsperson. A decision had been made to hire an outside person by an eleven-person committee. The plaintiff filed two charges; first, that she was not hired for the position because of her age; and second, that she was retaliated against for bringing age discrimination charges. A jury found in favor of the plaintiff. The defendant institution filed a "motion for judgment notwithstanding the verdict." The district court reviewed the evidence presented at trial in light of the shifting burden of proof in ADEA cases. Like Title VII cases, the burden is on the plaintiff to establish a prima facie case. The plaintiff, a person within the age limits of ADEA (forty to seventy years of age), qualified to fill the vacant position, was passed over for a person age thirty-six. This information established the prima facie case.

The burden then shifted to the defendant to show that valid reasons existed for hiring someone else. The evidence showed that the university decided that problems in the unit, some attributable to the plaintiff, resulted in a decision to seek an outside person. All members of the committee, some of whom were within the defined age (forty to seventy), testified that age was not a consideration but rather that the hired individual was more qualified for the position than the plaintiff. Finally, the plaintiff has the burden to prove that the reasons provided by the defendant are a mere pretext for discrimination. Evidence that she did not have a good working relationship with the director of the unit was not evidence of mere pretext, when an eleven-person committee made the selection. Plaintiff's failure to meet the requirements of the third part of the shifting burden automatically resulted in granting the defendant's motion for judgment notwithstanding the verdict.

---

[48] 438 U.S. 265 (1978).

[49] 443 U.S. 193 (1979).

[50] Lyon v. Temple Univ., 543 F. Supp. 1372 (E.D. Pa. 1982).

[51] EEOC v. University of Oklahoma, 554 F. Supp. 735 (W.D. Okla. 1982).

8.2a(6) Rehabilitation Act of 1973

In Arizona, a handicapped psychology professor at a state university brought charges of discrimination under sections 503 and 504 of the Rehabilitation Act of 1973, 42 U.S.C. § 1983, and the Revenue Sharing Act.[52] The district court granted a summary judgment to the institution on the basis that the plaintiff lacked a right to private action.[53] The plaintiff appealed on his claims under sections 503 and 504 and section 1983. The circuit court affirmed the lower court's opinion. A private right of action exists under section 504 of the Rehabilitation Act only where the primary objective of the federal financial assistance is to provide employment. This was not the primary objective of research grants given to the defendant institution as training grants for clinical psychologists. Also, under section 503 there is no provision for a right to private action. Finally, section 1983 does provide a private right to action for a violation of a federal statute under color of state law. However, the Supreme Court has enumerated two exceptions: (1) where the statute in question specifically prohibits a private right to action, or (2) where the statute does not create enforceable rights.[54] The circuit court, relying on a previous decision,[55] found that the administrative scheme provided by Congress in section 503 was intended to preclude any private right under section 503 of the Rehabilitation Act. Therefore, since the plaintiff lacked a private right to action in a court of law under any of the above-named statutes, the summary judgment in favor of the defendant university was upheld.

---

[52] Meyerson v. Arizona, 709 F.2d 1235 (9th Cir. 1983).

[53] Meyerson v. Arizona, 507 F. Supp. 859 (D. Ariz. 1981); Meyerson v. Arizona, 526 F. Supp. 129 (D. Ariz. 1981).

[54] *See* Middlesex Cty. Sewage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Pennhurst State School & Hospital v. Holderman, 451 U.S. 1 (1981).

[55] Fisher v. City of Tucson, 663 F.2d 861 (9th Cir.), *cert. denied*, 103 S. Ct. 178 (1982).

8.2a(7) Hiring Discrimination

Four cases serve to clarify legal obligations in the area of hiring. A case involving claims of discrimination in employment based on the applicant's nationality established some statutes of limitation for filing under 42 U.S.C. §§ 1981 or 1983.[56] The court ruled that since no statute of limitations for filing exists under sections 1981 and 1983, the courts must rely on appropriate and applicable state statutes. A Kansas statute allowing a two-year time limit to bring charges for injury to the rights of another, but not based on a contract, governs in this case. The plaintiff failed to meet the two-year limit and a summary judgment to the defendant university was upheld.

In a Florida case, the question was raised regarding the application of "Sunshine Laws" to a search and screening committee and faculty deliberations in the selection of a new law school dean.[57] The Florida "Sunshine Law" applied specifically to meetings of "boards" or "commissions" of any state agency. The court found that neither faculty nor the search committee were a "board" or a "commission" within the meaning of the provisions of the "Sunshine Law." Therefore, the "Sunshine Law" did not apply to this hiring process.

In a Kansas case, a black male plaintiff brought charges of discrimination in his unsuccessful attempt to gain an administrative position at a state medical college.[58] The charges were brought under 42 U.S.C. §§ 1981 and 1983 and Titles VII and VI of the Civil Rights Act of 1964 against the state, its agencies, and individuals named officially and individually. The court held that the state's immunity under the eleventh amendment barred suits brought against state agencies and officials in Kansas under sections 1981 and 1983, whereas claims against persons in their "individual capacities" were not dismissed under the eleventh amendment immunity clause. All charges under the federal statutes were dismissed, however, since the plaintiff failed to show that he had exhausted all administrative remedies through EEOC prior to filing a federal law suit.

A 1981 Maryland case[59] involving a Marxist professor's civil rights claims concerning his political beliefs came before the Fourth Circuit Court of Appeals.[60] The district court had ruled that the claimed failure of the president to select the Marxist professor as department chairman because of his political beliefs was not substantiated in fact.

---

[56] Garcia v. University of Kansas, 702 F.2d 849 (10th Cir. 1983).
[57] Marston v. Wood, 425 So. 2d 582 (Fla. Dist. Ct. App. 1983).
[58] Wrenn v. Kansas, 561 F. Supp. 1216 (D. Kan. 1983).
[59] Ollman v. Toll, 518 F. Supp. 1196 (D. Md. 1981).
[60] Ollman v. Toll, 704 F.2d 139 (4th Cir. 1983).

They ruled that the president's decision was based on valid academic reasons that would have resulted in a similar decision regardless of the professor's published political stands. The circuit court affirmed the decision.

8.2a(8) Sexual Harassment

A former employee of a community college in Florida filed suit alleging sexual harassment.[61] She charged that the president of the institution had offered "sexually seductive invitations" to her on numerous occasions. She based her claim on the "tort of intentional infliction of emotional distress," which has its origins in the *Restatement (2d) of Torts*, § 46. The District Court of Appeals of Florida held that this tort does not exist under Florida law. However, as there was some discrepancy in several cases on the existence of the tort in Florida, this court asked the Florida Supreme Court to resolve the issue. The court also asked the Florida Supreme Court to determine whether the trial judge acted appropriately in ruling on the pleadings that the president's conduct was not "so extreme or outrageous to permit recovery" or should such a determination be based on factfinding. The plaintiff was also unable to show a connection between sexual harassment and nonrenewal of her contract.

8.2b Nontenured Faculty

The volume of litigation involving nontenured faculty continues to be heavy, reflecting financial and job market factors. These cases continue to be concentrated in three areas: (1) claims of first amendment freedom of speech violations in nonrenewal decision, (2) claims of procedural violations in nonrenewal decisions, and (3) clarification of the rights of part-time faculty.

8.2b(1) First Amendment Freedom of Speech

In the conclusion of a case that began in 1971 involving a denial of tenure in violation of the faculty member's first amendment rights, the court awarded damages to the plaintiff.[62] In reviewing the facts, the court found that the faculty member had advised a student who was dismissed from the institution to seek legal counsel. The defendant institution argued that the faculty member's failure to discuss the matter with the dean of students or consult the student's file before giving advice showed that the plaintiff undertook his advising responsibilities in a "cavalier and immature fashion." The Sixth Circuit found that the plaintiff's first amendment free speech rights had been violated by the use of this reason for a nonrenewal decision. The court, however, for technical reasons, refused to affirm the lower court's award of back pay.

---

[61] Gmuer v. Garner, 426 So. 2d 972 (Fla. Dist. Ct. App. 1982).

[62] Stern v. Sholdice, 706 F.2d 742 (6th Cir. 1983).

8.2b(2) Nonrenewal Procedures

In this section numerous cases illuminate effective and inappropriate procedures. In a very complicated case, an Asian Indian professor who was denied tenure sued the institution for discrimination on the basis of national origin.[63] The plaintiff had been reviewed at the departmental and school level and recommended for tenure. Certain reservations about his teaching and references to his national origin were expressed by the dean in his recommendation to the provost. There were a number of decisions by the provost's office to deny tenure and subsequent appeals on behalf of the plaintiff by the dean and department head. Further, a report conducted by students was alleged to be tainted with questions of validity and racism and was ordered removed from his record. Plaintiff, during these reviews and the subsequent grievance and appeal procedure, upon requested reviews of his file, repeatedly found information missing from his file that would show he had met certain criteria. He also found that the controversial student report that was to have been expunged was repeatedly included in his file. The district court found that a prima facie case had been established for discrimination. The university's reasons were found to be a mere pretext for discrimination. The repeated decisions without key documents and the inclusion of the controversial student report were several factors in the court's decision. Further, the court noted that loss of confidence in the business school's rigor in making tenure decisions was inconsistent with a decision the next year to grant tenure based on the school and departmental recommendations. Also, the institution had put greater emphasis on teaching in this tenure decision case than it had in others. The court awarded the plaintiff back pay through 1983 but did not uphold a back pay award based on a lifetime of employment. The plaintiff did not ask for tenure or reinstatement. Attorney's fees were also awarded to the plaintiff.

In another case a nontenured faculty member alleged that both his liberty interest and property interest had been violated when he was issued a terminal contract.[64] The assistant professor, who possessed a master's degree, was recommended for tenure twice by the dean of the humanities school, but eventually was issued a terminal contract. The reason given by the institution in court was that plaintiff's teaching was not up to par and that the program was being upgraded by seeking a teacher with a doctorate. The district court issued a summary judgment in favor of the defendant. The Fifth Circuit Court upheld the lower court opinion in regard to any property interest claims by the plaintiff. They noted that recommendations to award tenure do not result in de facto tenure or a reasonable expectation of continued employment; therefore, the plaintiff lacked a property interest. However, the court remanded the case on the liberty interest claim. They noted that the evidence did not indicate whether statements about the plaintiff's teaching skills had been made public at the time of termination. Public pronoucements would implicate a liberty interest. The instructions given by the Fifth Circuit indicated that a finding of a liberty interest did not require reinstatement or awarding of tenure and back pay, but rather the awarding of equitable monetary damages.

---

[63] Kumar v. Board of Trustees of Univ. of Massachusetts, 566 F. Supp. 1299 (D. Mass. 1983).

[64] Wells v. Doland, 711 F.2d 670 (5th Cir. 1983).

An Illinois professor claimed a breach of contract in the institution's decision not to award tenure.[65] The institution's tenure committee, on review of the plaintiff's dossier, recommended that tenure not be granted. On review, the president of the institution felt that the committee had erred in not considering two letters of recommendation and recommended that the professor's dossier be returned to the committee for another evaluation. The board of trustees of the institution overruled the president's recommendation and denied tenure. The district court ruled that the board had the ultimate authority to award tenure and was within the law in overruling the president's recommendation. The board had not breached a contract.

In an Alabama case, the district court found that the university had breached a contract after it granted a one-year extension and subsequently denied tenure.[66] The faculty member had a dual faculty appointment in an innovative college and an interdisciplinary program in the college of arts and science. Both programs emphasized teaching; however, the plaintiff's research record, while substantial, was viewed as inadequate by the college of arts and science review committee. The academic vice-president, because of the nature of plaintiff's assignment, the promotion and tenure policies, and the decision of the colelge committee, extended the probationary period for one more year. In his letter, he explained to the plaintiff that she had one more year to improve her publications record, the only deficient area. The plaintiff had two additional articles published in refereed journals during that year, but tenure was denied. The court ruled that the university had breached a contract with the plaintiff. The court noted that the letter from the vice-president could be interpreted in one of two ways. One interpretation was that it was impossible for the plaintiff to improve her record in one year, which would be viewed by the court as a bad faith contract. The other interpretation was that it was possible for her to improve her publication record, which she had done; thus, a finding of a breach of contract and the order to award the plaintiff tenure.

---

[65] Ranyard v. Board of Regents, 708 F.2d 1235 (7th Cir. 1983).

[66] Gladney v. Thomas, 573 F. Supp. 1232 (N.D. Ala. 1983).

Another breach of contract claim was an appeal from an order to award tenure where an Arizona appeals court ruled that plaintiff's contract had been breached when he was not reviewed in his sixth year. The appeals court reversed the tenure order and ordered only the appropriate tenure review process.[67]

In a Pennsylvania case, the court ruled that failure to seek review of a decision not to grant tenure within the university's established appeal procedures precluded plaintiff's ability to seek a breach of contract claim. Further, the court ruled that as a nontenured faculty member, he failed to show a property or liberty interest requiring due process. The court granted the defendant institution a summary judgment.[68] In a subsequent decision, the court ruled that receipt of money by the institution and appointment to the institution's board of trustees of the state's nominee did not make the private institution's employment decision a state decision subjecting it to section 1983 claims.[69]

Several other property right and liberty interest cases were also before the courts. In a North Dakota case, six consecutive one-year contracts did not establish a property right,[70] while a Mississippi case found neither a property right or liberty right where a one-year probationary contract was not renewed, without public pronouncements.[71] In a Wisconsin case, a professor was not entitled to tenure review in his seventh year after denial in his sixth year.[72] In an Alaska case, the court ruled that the regulations under the Public Meeting Act govern tenure committee procedures.[73]

---

[67] Smith v. University of Arizona, 672 P.2d 187 (Ariz. Ct. App. 1983).
[68] Krynicky v. University of Pittsburgh, 560 F. Supp. 803 (W.D. Pa. 1983).
[69] Krynicky v. University of Pittsburgh, 563 F. Supp. 788 (W.D. Pa. 1983).
[70] Sacchini v. Dickinson State College, 338 N.W.2d 81 (N.D. 1983).
[71] Montgomery v. Boshears, 698 F.2d 739 (5th Cir. 1983).
[72] Pfeiffer v. Board of Regents of Univ., 328 N.W.2d 279 (Wis. 1983).
[73] University of Alaska v. Geistauts, 666 P.2d 424 (Alaska 1983).

8.2b(3) Part-Time Faculty

In a California case a part-time employee charged that the institution failed under state regulations to establish a procedure for notification of nonrenewal of a temporary employee contract.[74] The California court ruled that the institution had failed to establish these procedures, but this failure had a harmless effect on the plaintiff since she was warned six months prior to the end of the contract period that her contrct might not be renewed.

In another California case, part-time employees sued, demanding a pro rata pay rate equivalent to that paid to full-time regular instructors.[75] The court ruled that part-time employees are entitled to a pay scale prorated but equivalent to that paid to full-time instructors who are doing the same work.

8.2c Tenured Faculty

Controversies involving the relationships between tenured faculty and institutions are subdivided into several areas: (1) termination for cause, (2) denial of employee privileges associated with a faculty position, and (3) terminations or reductions resulting from financial exigencies or program elimination.

8.2c(1) Termination for Cause

A number of cases were decided this year involving termination for cause. A case that previously challenged the constitutionality of rules prohibiting concurrent full-time employment was again before the court.[76] In the current case plaintiff charged that the rule prohibiting concurrent employment was applied by the college in an arbitrary and capricious manner in violation of the fourteenth amendment.[77] Plaintiff based this charge on the fact that from its inception in 1969 until 1980 this rule in the collective bargaining agreement was not enforced. Plaintiff maintained that in order to revive the rule the defendant should have warned and notified the faculty. Defendants' decision to enforce the rule resulted in the dismissal of thirty faculty. The district court found that the defendants had operated in an arbitrary and capricious manner by failing to enforce a rule for ten years and then commencing enforcement without adequate notice. The institution's argument that administrative efficiency had prevented enforcement was not a defense to charges of arbitrary and capricious actions by the institution.

---

[74] Tiernan v. Trustees of California State Univ., 655 P.2d 317 (Cal. 1983).

[75] Ferris v. Los Rios Commun. College Dist., 194 Cal. Rptr. 16 (1983).

[76] *See* YEARBOOK 1982 at 265; Kaufman v. Board of Trustees, Commun. College, 522 F. Supp. 90 (N.D. Ill. 1981).

[77] Kaufman v. Board of Trustees, Commun. College, 552 F. Supp. 1143 (N.D. Ill. 1982).

In an Illinois case, the plaintiff was given a sixty-day suspension by the board of trustees of the community college.[78] The faculty member sued, claiming that the board exceeded its authority in suspending him for sixty days and further that failure to grant a request to have the case heard by an independent hearing agent violated his due process rights. The Illinois Appellate Court ruled that a rule authorizing the chancellor to suspend faculty for thirty days as a disciplinary measure did not imply that the board could suspend for longer periods, and therefore limited his suspension to thirty days. The court also ruled that the institution did not violate any rights by its failure to grant a hearing before an independent agent, as opposed to the committee that heard the case.

In another case, a tenured faculty member who twice refused to teach an assigned course was dismissed.[79] The first refusal resulted in a hearing in which the committee recommended that the plaintiff be required to teach the course but not be dismissed. The next year the faculty member received a contract stating that if he failed to accept the teaching assignment, he would be dismissed. After the second refusal a hearing was held and the plaintiff was dismissed. The court ruled that the institution's due process guarantees had been met and that plaintiff's free speech had not been violated.

In a West Virginia case a tenured faculty member who was given a hearing and ordered terminated by a hearing agent could not actually be removed or denied pay until such time as the appeals procedures within the institution have been completed.[80] The court further noted that the specific charges against the faculty member were never clearly stated, which was a violation of his due process rights. They remanded the case to the hearing agency to correct the due process errors. Further, the court ruled that any back pay award could not exceed his contracted salary for that year.

8.2c(2) Denial of Employee Privileges

A mathematics professor at a community college who received a Ph.D. in the study of higher education was denied additional salary compensation for the doctorate.[81] The department head refused compensation because the degree was not in the faculty member's area of teaching as stated in the school's policy. The district court ruled that the plaintiff's Title VII and equal protection claims were time barred as governed by state statutes. However, the Fifth Circuit Court ruled that the equal protection clause violation was continuous because the school had awarded salary compensation to other faculty with doctorates outside their teaching areas. Each day that these faculty received salaries different from the employee's was a continuing violation under the equal protection clause. They remanded the case for further proceedings on the equal protection clause claim.

---

[78] Inwang v. Community College Dist. No. 508, 453 N.E.2d 896 (Ill. App. Ct. 1983).
[79] Smith v. Kent State Univ., 696 F.2d 476 (6th Cir. 1983).
[80] Clarke v. West Virginia Bd. of Regents, 301 S.E.2d 618 (W. Va. 1983).
[81] Perez v. Laredo College, 706 F.2d 731 (5th Cir. 1983).

8.2c(3) Financial Exigencies

A case involving a Jewish American who lost his administrative position because of a financial exigency has implications for faculty financial exigency issues.[82] The institution, under severe financial crises, was ordered to reduce staff. The planned reductions were to take place in noneducational program areas. The plaintiff charged that the plan was based on a quota system that used national origin as a criterion and filed under a state human rights decision. The court, on appeal from a lower court, reversed the lower court decision in favor of the plaintiff.[83] The Court of Appeals of New York found that the plaintiff inappropriately relied on a statistical report conducted by the affirmative action office. The purpose of that report was to analyze the results of the reductions and was not the basis of the institution's decision to remove the plaintiff. Further, the court reiterated the position that statistics alone do not prove employment discrimination without evidence that actual employment practices were discriminatory. In this case, the reason for the employee's termination—that he was not qualified to teach at the college—was a valid nondiscriminatory reason. Further, the president's pronouncements that the retrenchment plan should not unduly harm any one group and his awareness of the ethnic makeup of the school's employees did not substantiate plaintiff's charge.

Another case involving financial exigencies resulted in the reduction of a black faculty member's contract.[84] The plaintiff filed suit, charging that discrimination at the university resulted in reduction of his twelve-months' contract to nine months, salary increases smaller than others in his department, and harassment. The plaintiff was given unusual benefits at the time he was hired, such as a twelve-months' contract, rank as an associate professor, and tenure after one year. In the ensuing five years, his research and teaching were found to be substandard. The plaintiff was unable to establish a prima facie case for discrimination. His salary raises were similar to another white faculty member in his department with similar job responsibilities and performance evaluations. The reasons for salary differentials were found by the court to be based on valid performance criteria. The contract reduction was based on financial exigencies; plaintiff, through summer school employment, was still employed for twelve months; and a nine-months' contract is the typical arrangement the school had with other faculty. Finally, the harassment charges were found to be groundless.

---

[82] CUNY-Hostos Commun. College v. State H.R.A.B., 449 N.E.2d 1251 (N.Y. 1983).

[83] CUNY-Hostos Commun. College v. State H.R.A.B., 444 N.Y.S.2d 973 (N.Y. App. Div. 1980).

[84] Tolliver v. Yeargan, 567 F. Supp. 116 (W.D. Ark. 1983).

8.2d Collective Bargaining

A Minnesota case challenging the exclusive bargaining rights of a faculty union was argued before the Supreme Court.[85] The district court decision had raised three questions.[86] First, does recognition by the state of a private agency as the exclusive bargaining agency constitute an "impermissible delegation of state sovereignty"? Second, does the compulsory collection of fair share fees from nonmembers constitute "forced association," with a political party? Finally, does the meet and confer provision, which allows only the union to select members of the meet and confer committees, violate plaintiff's first amendment rights? The district court, citing *Abood v. Detroit Board of Education*,[87] ruled that the union's assignment as the exclsuvie bargaining agent for faculty was not an impermissible delegation of state power. Further, based on *Abood*, the court found that collection of air share fees from nonmember employees did not force them to associate with a contrary political party since unions are promoting economic issues and the plaintiff made no showing that the money went to promote political activity. However, the court did find that exclusive union representation on meet and confer committees did violate the plaintiff's first amendment freedom of speech and associational rights.

The question of required arbitration in nontenure decisions was before the court in several companion cases before the Hawaii Supreme Court. These cases involved the question of whether a university decision not to promote and give tenure to a number of faculty should be subject to arbitration. In the first case, the court found that arbitration as provided by the collective bargaining agreement should be compelled. Further, the court ruled that the university clearly has the authority to set criteria for promotion and tenure that must be accepted by the arbitrator. The arbitrator, according to the court, must follow the university's decision unless he finds they failed to use the criteria.[88] In a second case, the court found that an arbitrator could award tenure if he found the university official acted in an arbitrary and capricious manner but a rehearing would be required to reach such a finding.[89] In a third case, the court found that an arbitrator could substitute his evaluation of the criteria for that of a university official and award tenure, but he could not empanel a new tenure review committee to make these judgments for him.[90] In the final case, the court ruled that an arbitrator may not decide which of the criteria as set out by the university should be used in deciding whether the faculty member should be promoted.[91]

---

[85] Minnesota Commun. College Bd. v. Knight, 52 U.S.L.W. 3008 (U.S. Nov. 11, 1983).

[86] Knight v. Minnesota Commun. College Faculty Ass'n, 571 F. Supp. 1 (D. Minn. 1982).

[87] 431 U.S. 209 (1977).

8.2e Administration and Staff

A number of cases challenging dismissals have surfaced in 1983. In an Illinois case a psychologist, holding a contract that stated that he served at the pleasure of the president, recently moved from a one-year contract to a "continuous appointment" and was later dismissed with a twelve-months' notice of dismissal.[92] Institutional policy required that a continuous employee's dismissal without cause required a notification twelve months prior to termination. The plaintiff sued, alleging a violation of is due process rights since had had a reasonable expectation of employment (property right). The Seventh Circuit Court ruled that dismissal with twelve months' advance notice without cause was permissible for employees serving at the pleasure of the president. The plaintiff was found to be without a property interest under these circumstances.

In a California case a female police officer was removed from her position at the college because of dishonest use of sick leave, discourteous treatment of fellow employees, inattention to and dereliction of duty, and insubordination.[93] Plaintiff sued, alleging violations of her liberty and property interests under the fourteenth amendment and Title VII discrimination on the basis of sex. The district court found no Title VII violation, but found that fourteenth amendment due process rights were violated. The Ninth Circuit Court affirmed that her property rights but not her liberty interest had been violated because her employment was terminated immediately on notification of the charges. However, actual termination should not have taken place until after all established hearing and appeals procedures had been satisfied. The court remanded the case for a new determination of the amount of damages.

---

[88] University of Hawaii Professional Assembly v. University of Hawaii, 659 P.2d 717 (Hawaii 1983).

[89] University of Hawaii Professional Assembly, Daeufer v. University of Hawaii, 659 P.2d 720 (Hawaii 1983).

[90] University of Hawaii v. University of Hawaii Professional Assembly, Wiederholt, 659 P.2d 729 (Hawaii 1983).

[91] University of Hawaii v. University of Hawaii Professional Assembly, Watanabe, 659 P.2d 732 (Hawaii 1983).

[92] Grimes v. Eastern Illinois Univ., 710 F.2d 386 (7th Cir. 1983).

In a case before the North Dakota Supreme Court a retiring administrator was ordered to take his annual leave at his convenience prior to his retirement.[94] Failure to make arrangements to take annual leave resulted in its being accrued during the final days of his employment. The result was that the plaintiff was ordered to vacate his office prior to his retirement day after twenty-four years of service to the institution. The court ordered the institution to pay the employee for accrued annual leave. They noted that payment of annual leave had taken place in other retirements. The employee's offer of services while the institution banned him access to his office did not equal failure to perform services negating the compensation for annual leave.

In the final case of this section, a former dean of education, dismissed by the board of trustees of the institution sued, alleging defamation and violations of his civil rights.[95] The Louisiana Court ruled that the board meetings were not subject to state open meeting laws, that the mere act of dismissal was not an act of defamation, and that the president's pronouncements regarding the dean's performance were not made to the board. None of these actions implicated a liberty interest.

8.3 STUDENTS

The area of students' rights saw a very active year. Nonresident tuition questions were back in the courts this year. The federal government loan default cases continued, along with a question of separation of church and state in the awarding of state student aid. First amendment issues were numerous and involved commercial speech, associational rights of single-sex honorary societies, and freedom of press issues surrounding institutional funding schemes for student newspapers. Disciplinary dismissal and academic dismissal cases continued to illuminate student rights in these two areas. Cases involving questions of student rights under federal regulations and National Collegiate Athletic Association (NCAA) eligibility regulations round out this section.

---

[93] Jones v. Los Angeles Commun. College Dist., 702 F.2d 203 (9th Cir. 1983).

[94] Aasmundstad v. Dickinson State College, 337 N.W.2d 792 (N.D. 1983).

[95] Hicks v. Stone, 425 So. 2d 807 (La. Ct. App. 1983).

8.3a Admission

The one case in this area concerns discrimination on the basis of sex in a denial of admission to medical school. This case is the third part of a trilogy of claims that commenced in 1974. The first case, *Cannon v. University of Chicago*, established the right to private action under Title IX.[96] On remand the district court and the circuit court affirmed a dismissal for failure to establish purposeful discrimination.[97] In the present case, the plaintiff had alleged that she was discriminated against on the basis of sex and race in a medical school's denial of her application for admission.[98] The court granted a summary judgment to the defendant institution. They found the eleventh amendment barred a suit against a state institution or its individual officers. They also noted, for purposes of laches, that plaintiff's delay in filing suit was not excusable and the suit was time barred.

8.3b Nonresident Tuition

Numerous cases were heard this year that dealt with challenges to the constitutionality of state classifications of students as nonresidents for the purpose of tuition and fees. Challenges came under both the eleventh and fourteenth amendments.

In a Maine case students alleged that (1) the state required a greater burden of proof for students seeking reclassification as residents than it did at the time of admission; (2) they were discriminated against by policies that allowed married nonresidents to assume the classification of their resident spouse and by the automatic resident classification of military personnel; and (3) a de facto "irrebutable presumption" of nonresidency existed.[99] They alleged violations of due process and equal protection under the fourteenth amendment. The court ruled that a nonresident student who is enrolled in the university will be presumed to be in the state for educational purposes only and has the burden of proving otherwise. The court also noted that the appropriate equal protection test was whether the residency law had a rational relationship to the integrity of a citizen's tax contribution. Further, in this case state-subsidized postsecondary education was viewed as not being a fundamental constitutional right. As a result, there was no equal protection violation by automatic reclassification of some individual due to state interest in doing so. Finally, the court indicated that there were no due process violations in the denial of the requests in question. However, the institution's requirement that the individual must be a bona fide resident of the state for one year prior to being reclassified as a resident violated the equal protection clause. The court distinguished this rule from the one-year rule to establish residency in *Starns v. Malkerson*.[100]

---

[96] *See* YEARBOOK 1982 at 46; Cannon v. University of Chicago, 441 U.S. 677 (1979).

[97] *See* YEARBOOK 1982 at 267; Cannon v. University of Chicago, 648 F.2d 1104 (7th Cir. 1981), *cert. denied*, 103 S. Ct. 1254 (1983).

[98] Cannon v. University of Health Sciences/Chicago Medical School, 710 F.2d 351 (7th Cir. 1983).

[99] Black v. Sullivan, 561 F. Supp. 1050 (D. Me. 1983).

In a Wisconsin case, the Seventh Circuit ruled that the fourteenth amendment due process clause did not require a written reason for the denial of a request for residency reclassification.[101] A Wisconsin statute dealing with classification of students was also dealt with. The court noted that this statute provided the equal protection guarantees noted above by providing students the opportunity to rebut the presumption of continued nonresidency. In its ruling the court indicated that no property or liberty interests were contravened by the action of the residency review committee. It also noted that there is a legitimate government interest in preserving state institution quality and the right of instate students to attend state colleges. This interest was protected by the diversity of tuition levels. Finally, the court stated that the imposition of requirement of a statement of reasons for denial would "impose significant administrative and fiscal burdens on the state; and the crush of erroneous decisions under the procedures now used is reasonably minimized."[102]

A third case heard by the District Court in Rhode Island also raised the due process issue.[103] Here the court ruled that the student's due process rights had not been violated by the regulations. The regulations were fair and not applied in an arbitrary manner.

In a related case the Nevada District Court was asked to grant a preliminary injunction enjoining enforcement of a Nevada statute that required a five-years residency in the state to qualify for graduate and professional school financial aid funds through Western Interstate

---

[100] *Id.* at 1066; *see also* Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971).

[101] Lister v. Hoover, 706 F.2d 796 (7th Cir. 1983).

[102] *Id.* at 805.

[103] Vanlaarhoven v. Newman, 564 F. Supp. 145 (D.R.I. 1983).

Commission for Higher Education (WICHE).[104] The plaintiffs in the case raised fourteenth amendment equal protection as well as privileges and immunities questions. The court threw out the privileges and immunities claims, but noted that a strong possibility existed that the plaintiffs would prevail in their equal protection challenge. They stated that the five-years residence requirement seemed not to be rationally related to valuable state interests of having persons who receive scholarships return to Nevada after graduation. As a result, equal protection guarantees could be threatened.

An Indiana case rounds out the growing litigation on nonresident tuition. In that case the procedures and decisions of a committee that determined residency were upheld.[105]

8.3c Financial Aid

8.3c(1) Student Loan Default Collections

One case in this section involved a government suit to recover the principal plus interest on defaulted loans under a government student loan program.[106] The defendant asked for a summary judgment on the grounds that the suit was time barred due to a six-year statute of limitations. The defendant alleged that the six-years period began in 1972 when she assumed the loan. The United States alleged that the time period began in 1974 when the government paid the private lender and assumed the loan. The court ruled that consistent with other suits[107] the government established its right to sue for default after it paid the private bank's claim and the time for the statute of limitations was calculated from that date.

In a case heard in the District of Columbia, the United States sued a student who had defaulted on a federally guaranteed student loan.[108] The student argued that he had the same right to present defense against government collection of the loan as he had against the school's collection procedures. This right had been precluded since the district court[109] had granted summary judgment for the government. The student alleged that the "school salesman used high-pressured tactics to sell empty dreams to the poor and hopeless, that [the] school was shamefully inadequate and that defaults were common because students often emerged with no marketable skills."[110] The court held that the student's defense should be heard and reversed and remanded for a hearing on the merits of the case. The court viewed this case as unique since the school had closed and was found to be somewhat inadequate in its academic programs.

---

[104] Kuhn v. Vergiels, 558 F. Supp. 24 (D. Neb. 1982).

[105] Allen v. Scherer, 452 N.E.2d 1031 (Ind. Ct. App. 1983).

[106] United States v. Tilleraas, 709 F.2d 1088 (6th Cir. 1983).

[107] *See* YEARBOOK 1983 at 312-13.

[108] United States v. Griffin, 707 F.2d 1477 (D.C. Cir. 1983).

[109] *See* YEARBOOK 1983 at 313; United States v. Griffin, 530 F. Supp. 604 (D.D.C. 1982).

8.3c(2) Student Aid Grants

The question of separation of church and state was raised by a state student grant program in North Dakota.[111] The district court ruled that a 1981 amendment to the statute governing the state's tuition assistance grant program was violative of the first amendment establishment clause. The statute provided state grant-in-aid monies based on financial need to students attending two Bible colleges in the state.

The two Bible colleges were accredited not by the North Central Association of Colleges, as were the other colleges in the state, but by the American Association of Bible Colleges. The court ruled that this statute clearly violated all three prongs of the test in *Lemon v. Kurtzman.*[112] The nature of the statute was such that (1) it has a religious purpose, (2) it promotes religion, and (3) it fosters excessive government entanglement with religion. The fact that the money was given to students did not insulate the aid program from these problems.

8.3d First Amendment

The cases in the area of first amendment rights have been organized into three basic areas: freedom of speech, freedom of association, and freedom of the press.

8.3d(1) Freedom of Speech

This year several cases were heard involving commercial speech or solicitation in institutionally owned residence halls. All of these cases involved American Future Systems, Inc. (A.F.S.), which sells housewares to college students in meetings held on campus. The cases reviewed in this section represent conflicting positions by the courts concerning the question of whether prohibition of solicitation in institutionally owned residence halls is in violation of first amendment speech and association guarantees.

In a Pennsylvania case[113] several students and A.F.S. sued the university, alleging that university regulations prohibiting solicitation in residence halls violated first amendment guarantees. A previous ruling by the district court[114] granting a preliminary injunction allowed the institution to continue enforcement of the rules until the present case was litigated. The district court found the regulations in violation of the first amendment. In the opinion of the court, the university failed to demonstrate a compelling state interest to regulate commercial speech. The institution's regulations failed to provide for ample alternative channels for the communication of information.[115] The flow of information that students might receive from attendance at such a solicitation meeting was a protected right guaranteed by the first amendment.

---

[110] Griffin, *supra* note 108, at 1478.

[111] d'Errico v. Lesmeister, 570 F. Supp. 158 (D.N.D. 1983).

[112] 403 U.S. 602 (1971).

[113] American Future Sys., Inc. v. Pennsylvania State Univ., 568 F. Supp. 666 (M.D. Pa. 1983).

In contrast, a New York case yields a different opinion. Students and A.F.S filed suit alleging violations of first amendment guarantees through a state university's regulations that prohibited solicitation in residence halls, including invited group demonstrations held in a student's room.[116] In this opinion, the district court differentiated between "pure speech" and "commercial speech." The court applied less stringent standards of protection to avoid violations in areas of commercial speech. While the university could not prohibit the exchange of information through product demonstration, it could prohibit consummation of sales at the conclusion of the demonstration. The court found the state had a legitimate and compelling interest in "preventing disruption, protecting the safety and security of students, and protecting students from commercial exploitation."[117] Thus, while the institution could not prohibit the dissemination of consumer information, it could prohibit commercial transactions. The resolution of these conflicting opinions will be a matter for further litigation, ultimately perhaps before the Supreme Court.

8.3d(2) Freedom of Association

Freedom of association and due process rights under the first and fourteenth amendments were the topics of consideration in a case heard before the district court in Louisiana.[118] Here, a graduate assistant at Louisiana State University was moved from a teaching position to a research position when it was learned that she was involved in a homosexual relationship with a student who was not in any of her classes. The plaintiff raised first amendment associational questions, as well as fourteenth amendment due process and equal protection claims, citing instances in which similar heterosexual relationships did not result in similar action. The court ruled that her first amendment associational rights had not been violated since no effort was made by the university to prohibit her private relationship. The only conduct that was altered was job related. The fact that her employers considered her actions to be detrimental to the university was a valid reason for the employer's action. The court also noted that her due process claim failed because no liberty or property rights were violated by the university since she had no right to continued employment as a teacher and was subjected to no stigma by the university's action. Finally, the court ruled that the plaintiff had not been discriminated against since a compelling state interest existed to resolve problems related to the situations created by her teaching assignment.

---

[114] American Future Sys., Inc. v. Pennsylvania State Univ., 553 F. Supp. 1268 (M.D. Pa. 1982).

[115] American Future Sys., Inc. v. Pennsylvania State Univ., 568 F. Sup. 755 (M.D. Pa. 1983).

[116] American Future Sys., Inc. v. State Univ. of Cortland, 565 F. Supp. 754 (N.D.N.Y. 1983).

[117] *Id.* at 764.

[118] Naragon v. Wharton, 572 F. Supp. 1117 (M.D. La. 1983).

Another freedom of association case involved an all-male honorary society at a private institution in Florida.[119] The case resulted when the Department of Health and Human Services (HHS) threatened to remove federal funding because the university recognized a prestigious all-male honorary society in violation of Title IX. The society filed suit seeking to enjoin HHS from terminating federal funding of University of Miami programs.[120] This current decision, on remand from the Supreme Court, raised the question of the authority of HHS regulations measured against the program specificity of Title IX as held in the *North Haven* case.[121] The circuit court found that a prestigious all-male honorary society had a "pervasive discriminatory effect" on women in all of the institution's academic programs regardless of federal funding.[122] In reaching this ruling, the court relied on the "infection theory," that is, that discrimination was so pervasive that it infected programs receiving federal financial assistance and was a violation of Title IX. The issue of mootness was also raised by the defendant university since the institution had subsequently removed the organization's recognition and denied it use of university facilities as long as it maintained its single-sex membership requirements. While the circuit court rejected the mootness argument, the Supreme Court, on appeal, ruled the issue moot.[123]

---

[119] Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549 (5th Cir. 1983).

[120] Iron Arrow Honor Soc'y v. Hufstedler, S.D. Fla. 1980); Iron Arrow Honor Soc'y v. Schweiker, 652 F.2d 445 (5th Cir. 1981), *vacated and remanded*, 102 S. Ct. 3475 (1982).

[121] North Haven Bd. of Educ. v. Bell, 102 U.S. 1912 (1982).

[122] Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 561 (5th Cir. 1983).

[123] Iron Arrow Honor Soc'y v. Heckler, 52 U.S.L.W. 3384 (Nov. 15, 1983).

8.3d(3) Freedom of Press

Several freedom of press cases involved the funding methods used to publish student newspapers. In a Minnesota case the editors of the student newspaper at the University of Minnesota brought suit against the university as a result of a decision to change the funding method that supported the newspaper.[124] The editors alleged that the funding change was at least partially motivated by the administration's dissatisfaction with controversial content of a particular issue of the paper. As a result, the editors claimed a violation of first amendment freedom of press guarantees since revenues were reduced and editorial freedom was "chilled." The court ruled that failure by the university to take similar funding actions with regard to other university newspapers indicated that the action was at least partially motivated by the reasons alleged by the plaintiffs, resulting in a violation of the first amendment. A university may not take such actions as a result of disagreement with content of the publication.

In a North Carolina case involving a student challenge to partial funding of a student newspaper, the Fourth Circuit addressed first and fourteenth amendment questions dealing with freedoms of speech, association, and press, as well as equal protection.[125] Several students challenged a university requirement that called for payment of student fees to support the student newspaper, which plaintiffs alleged advocated views with which they disagreed. The court ruled that the minimal restriction of rights that accrued did not violate the fourteenth amendment. The newspaper served valuable functions, both in pursuit of communication within the university and the open exchange of ideas. Therefore, first amendment speech and associational rights were not abridged. The court also ruled that it could not force the newspaper to print, on an equal basis, opinions that disagreed with the paper's editorial opinions. This, they said, would violate the first amendment freedom of press guarantees.

8.3e Dismissal

8.3e(1) Disciplinary Dismissal

Several cases concerning student dismissals were heard by the courts this year.

In an Alabama case the Supreme Court of Alabama ruled that university officials followed proper due process procedures and did not act in bad faith in taking disciplinary action against a student who had made threats and harassing phone calls to a professor over a course grade.[126] According to the student, actions of school officials resulted in his being punished twice for the same offense. The court ruled that the university officials had acted in good faith and that there was no basis in material facts for the student's claim.

---

[124] Stanley v. McGrath, 719 F.2d 279 (8th Cir. 1983).

[125] Kania v. Fordham, 702 F.2d 475 (4th Cir. 1983).

The Supreme Judicial Court of Massachusetts dealt with the question of arbitrary and capricious action on the part of college officials.[127] In this case the student was found guilty of interfering with the rights of other students by preventing them from entering a female student's room that the plaintiff and others had occupied illegally. One student was expelled by the college. After the expulsion decision by the dean of students, the student initiated an action for which a temporary restraining order preventing expulsion was given. In an appeal to the college president, the student agreed to withdraw his claim and waive the right to future action. The president upheld the dean's expulsion decision and the student again filed suit. The court ruled that the waiver of the right to action was valid and that the college acted within its contractual rights. As a result, summary judgment was granted to the institution. Further, the court acknowledged the institution's right to vary the punishment of individuals involved in an incident based on valid reasons such as the level of an individual's involvement.

In another Massachusetts case, a Boston University law student was expelled from the university as a result of several incidents in which he was caught peeping up the skirts of women students in the university library.[128] The First Circuit ruled that his due process rights had not been violated by use of the undergraduate due process procedures rather than the procedures used by the law school since the students bringing the charges were not law students. Nor had the plaintiff's contractual rights been violated by using the undergraduate process. Further, the availability of the transcript of the plaintiff's previous rape trial to the disciplinary committee did not violate his rights since the trial was a matter of public record.

In a final disciplinary dismissal case, the Florida District Court of Appeal ruled that a pharmacy student could be summarily dismissed from pharmacy school as a result of his conviction of possession of cocaine.[129] However, they noted that the student must be dismissed rather than expelled, but failed to explain the practical difference.

---

[126] Hartman v. Board of Trustees of Univ. of Ala., 436 So. 2d 837 (Ala. 1983).

[127] Coveney v. President & Trustees of College of Holy Cross, 445 N.E.2d 136 (Mass. 1983).

[128] Cloud v. Trustees of Boston Univ., 720 F.2d 721 (1st Cir. 1983).

[129] Wallace v. Florida A & M Univ., 433 So. 2d 600 (Fla. Dist. Ct. App. 1983).

8.3e(2) Academic Dismissal

There were a number of issues before the courts this year concerning academic dismissals and academic decision-making with regard to the setting of grades and graduation requirements. These cases show the continued willingness of judges to grant deference to academicians in academic decision-making.

One particular case that shows the traditional position of judges with regard to academic decisions is a Georgia case in which the Supreme Court of that state found no justifiable controversy with regard to decisions on academic matters made by faculty members.[130] In this case a number of faculty refused to give a former student recommendations for a doctoral program. As a result, she charged a wide variety of contract, tort, and constitutional violations. The court refused to review the faculty member's academic decisions with regard to the quality of student work.

Several of the cases on this topic raise the issues of arbitrary and capricious action, or other impermissible behaviors, by the college or university as a basis for due process claims in academic dismissal. In one Pennsylvania case a medical student was dismissed for failure to adequately perform a pediatric clerkship.[131] Here the court ruled that the professor's decision was not arbitrary or capricious since there was clear evidence of inadequate performance by the student. It was also ruled that the student was given more than adequate due process procedures prior to his dismissal.

In another case involving a medical student the district court in Michigan ruled that the University of Michigan was protected from monetary damages by the eleventh amendment.[132] Here the student challenged his dismissal from the university and sought damages rather than reinstatement. In a related case the same plaintiff sought judicial compulsion to order the university to allow him to retake a part of a national medical examination.[133] The court refused to order this action and noted that the institution's decision was reached in an apparently fair and impartial manner and that as a result it did not violate substantive due process requirements. The court noted that the university had made a good faith evaluation of academic performance and that there was no apparent bad faith, ill will, or ulterior motive.

---

[130] Woodruff v. Georgia S. Univ., 304 S.E.2d 697 (Ga. 1983).

[131] Stoller v. College of Medicine, 562 F. Supp. 403 (M.D. Pa. 1983).

[132] Ewing v. Board of Regents of Univ. of Michigan, 552 F. Supp. 881 (E.D. Mich. 1982).

[133] Ewing v. Board of Regents of the Univ. of Michigan, 559 F. Supp. 791 (E.D. Mich. 1983).

In another case a medical student attending a Wisconsin institution was dismissed because of a low grade point average and interpersonal conflicts with other medical students and faculty.[134] The student was notified, given a hearing, and had access to various appeals. The plaintiff charged violation of his due process rights along with discrimination based on religion, race, and sexual orientation. The district court found that the university had acted properly in its dismissal of the student, that the university's due process procedures were adequate, and that no facts supported an equal protection claim.

In a Virginia case a student was expelled for academic deficiencies.[135] In September of his third year the student was notified of incompletes on several courses taken in his second year of law school. Subsequent to the notification the student became embroiled in an honor code violation requiring him to defend himself. After three trials, guilty verdicts, appeals and remands, the charges were dropped. The student alleged that this activity interfered with his ability to make up the deficiencies. He also alleged violations of due process. Acknowledging some concern with the honor code judicial system at the University of Virginia, the court found the procedures would "withstand Constitutional condemnation upon facial attack."[136]

However, in a North Carolina case a student was successful in getting a preliminary injunction for readmission until the case could be decided on the merits.[137] The court found that a nursing student's allegation of due process violations in the award of a failing grade, based on a finding by the dean that she had cheated on an examination, raised questions to be adjudicated. When balancing the student's hardship with the institution's prerogatives, the court found hardship balanced toward the student, thus the injunctive relief. Evidence was sufficient to raise grave and serious questions about the university's actions.

Two other state cases failed to show bad faith or due process violations in academic dismissal.[138]

8.3f Federal Regulations

In a Texas case the district court decided questions related to student institutional contracts, section 504 of the Rehabilitation Act of 1973,[139] and the fourteenth amendment. This case involved the university's shuttle bus program. A number of University of Texas students who were mobility impaired challenged the university's refusal to modify the shuttle buses to accommodate wheelchairs. The court ruled that although the students were "otherwise qualified handicapped individuals" under section 504, the program specific requirements of 504 excluded the university and its bus system from coverage by the act.[140] The bus system received no direct federal funds and handicapped students could not claim a right to ride shuttle buses or the right to live off campus. On their fourteenth amendment claim, the court ruled that because of the costs involved with modifications and the small number of students who would be benefited, the university had a legitimate governmental interest in not making the modifications. The court also ruled that the students had no claim of a property right under the fourteenth amendment, nor was the general information booklet published by the university part of its contract with students. The university was not obligated to provide shuttle service in return for payment of student fees.

---

[134] Sanders v. Ajir, 555 F. Supp. 240 (W.D. Wis. 1983).

[135] Henson v. Honor Comm. of Univ. of Virginia, 719 F.2d 69 (4th Cir. 1983).

[136] *Id.* at 75.

[137] Jones v. Board of Governors of Univ. of North Carolina, 704 F.2d 713 (4th Cir. 1983).

[138] State *ex rel.* Mercurio v. Board of Regents, 329 N.W.2d 87 (Neb. 1983); Wilson v. Illinois Benedictine College, 445 N.E.2d 901 (Ill. App. Ct. 1983).

[139] 29 U.S.C. § 794 (1973).

8.3g NCAA Regulations

A football player challenged eligibility rules of the National Collegiate Athletic Association (NCAA) governing transfer from one four-year institution to another in successive years.[141] The plaintiff sued, alleging that rules regarding eligibility had been interpreted and applied in an arbitrary and capricious manner by the NCAA and attempted to apply the state monopolies law. A temporary injunction had been issued that allowed the plaintiff to play in four games on the freshman football team. The court ruled that the NCAA rules had been applied fairly and correctly, resulting in the plaintiff's ineligibility to participate in athletics for one year. State monopolies laws did not apply in this institution.

8.4 LIABILITY

Claims of institutional liability continue to reach the courts. These claims are organized under several headings. First, are personal injury claims. Second are claims under workers' compensation. Third are cases involving contract liability.

---

[140] Ferris v. University of Texas at Austin, 558 F. Supp. 536 (W.D. Tex. 1983).

[141] English v. National Collegiate Athletic Ass'n, 439 So. 2d 1218 (La. Ct. App. 1983).

8.4a Personal Injury

A number of personal injury cases resulted from incidents, including a car accident during a student trip, a rape in a residence hall, placement of a hose across a sidewalk, and athletic injuries during university-sponsored activities. In the first case, the husband of a nursing student killed in an automobile accident while on a school field trip sued, based on negligence.[142] The deceased student nurse's liability release form, a waiver executed by all students taking the trip, was not admitted as evidence in the court. Named in the suit were the insurance companies of the institution, the student driver, and a trucking company involved in the crash, among others. The court of appeals upheld the trial court's award of damages to the plaintiff. The court stated that the waiver did not met the voluntary requirements of a waiver under Louisiana law, since it was a requirement of the field trip, which in turn was a requirement of the nursing program. Thus, the trial court was correct in not admitting the waiver as evidence. Further, the student driver was an agent of the institution, and the nursing students were not collectively involved in a joint venture. The evidence indicated negligence in the operation of the vehicle and institutional negligence in not providing a qualified driver.

In another case, where a student at a state institution was raped in her dormitory room, the plaintiff sought to recover damages based on the state's liability as a landlord.[143] The court found that in actuality the claim was based on suggested inadequate police protection by the state. The level of police protection claimed by the plaintiff was not necessary unless a special relationship existed between the plaintiff and the state, which she failed to establish.

A Texas Court of Appeals reversed and remanded a student's tort claims act suit dismissed by a lower court.[144] At issue on remand will be the question of placement of a water hose across a sidewalk without warning, which allegedly resulted in injury to the plaintiff and created an unsafe condition at the entrance to the library.

Several cases involved students participating in university athletic activities. In one case, a student participating in a floor hockey game, while attempting to tackle an opponent who had stolen the puck, received a fractured cervical spine.[145] The court found that his claim that the injury was due to lack of supervision and training by the referees was not supported by the facts. The referees' officiating, which was performed with reasonable care, did not contribute to plaintiff's injury, but rather his own actions in this case were the proximate cause of the injury.

---

[142] Whittington v. Sowela Tech. Inst., 438 So. 2d 236 (La. Ct. App. 1983).
[143] Miller v. New York, 466 N.Y.S.2d 436 (N.Y. App. Div. 1983).
[144] Rawlings v. Angelo State Univ., 648 S.W.2d 430 (Tex. Civ. App. 1983).
[145] Pape v. New York, 456 N.Y.S.2d 863 (N.Y. App. Div. 1983).

A softball player, in another case, who slid into third base on a makeshift field was injured when her foot caught in a depression concealed by tall grass.[146] The court rejected the defendant institution's motion, invoking the doctrine of assumption of risk and contributory negligence. The plaintiff, at the moment of injury, was participating in a normal activity of softball and had no prior knowledge of the depression; therefore, the plaintiff's actions were not culpable conduct. Defendant was found to be negligent, affirming the lower court decision.

A third athletics case involved a case of student negligence.[147] A student athlete sprained his ankle and was treated by the student trainer with wraps and ice. The student may have spent one night with his foot immersed in a bucket of ice. The result was that the student lost several toes and muscle tissue in the foot. The foot may have to be amputated below the knee due to gangrene and osteomyelitis resulting from frostbite. The court found that the student athlete, not the institution, its trainer, or the team physician, was negligent in this case. The instructions to ice the sprain for short periods of time were clearly stated but not followed by the student.

8.4b Workers' Compensation

A suit against John Deere Company and Cornell University was brought for injuries sustained when a muffler on a tractor exploded while a student employee was working on the agriculture school's farm.[148] The court found that since the individual was viewed as an employee receiving workers' compensation, he could not pursue this remedy. The Workmen's Compensation Act is the exclusive remedy for employees.

8.4c Contract Liability

A North Carolina case involved the royalties on a process developed by two faculty members, which was being successfully marketed by a university foundation.[149] The faculty members, after developing sweet acidophilus milk, had allowed the university's dairy foundation to process and market the product. Plaintiffs never signed over legal title of the process to the foundation, but had agreed to allow the foundation to market the product. The plaintiffs worked closely with the foundation to produce and market the product. When it became clear that no provisions had been made for the plaintiffs to receive royalties from this very successful product and a request for royalties was denied, plaintiffs filed suit in district court asking for equitable distribution of the royalties. The district court issued a summary judgment in favor of the defendant university and its foundation, finding that no genuine issue of material fact existed and that the three-year statute of limitations under contrct law had lapsed.

---

[146] Lamphear v. New York, 458 N.Y.S.2d 71 (N.Y. App. Div. 1983).

[147] Gillespie v. Southern Utah State College, 669 P.2d 861 (Utah 1983).

[148] Neish v. John Deere Co., 460 N.Y.S.2d 861 (1983).

[149] Speck v. North Carolina Dairy Found., 307 S.E.2d 785 (N.C. Ct. App. 1983).

The Court of Appeals of North Carolina reversed and remanded the case for trial. They noted that the district court had erred in using the statute of limitations under contract and fraud statutes. The court of appeals found the relationship between the plaintiff faculty and the institution and its foundation was one of fiduciary duty. A fiduciary duty existed where special confidence was placed in the university to act in good faith and with due regard to the interest of the one reposing the confidence. Plaintiffs did not sign over their rights to the process, but did acknowledge the legal title to defendants. Such acknowledgement does not establish waiver or abandonment on the part of the plaintiffs. On remand, the jury must decide whether plaintiffs entrusted defendants with a secret process with the expectation that defendants would protect plaintiffs' interests in a fair share of the royalties. If yes, then no waiver or abandonment occurred.

8.5 ANTITRUST

The question of the National Collegiate Athletic Association's (NCAA) right to control the telecast of collegiate football games under guidelines of the Sherman Antitrust Act[150] was again before the courts on appeal.[151] As reported last year, the district court found NCAA to be involved in price fixing, restricting output, and constituting a group boycott in violation of the Sherman Antitrust Act.[152] The Tenth Circuit Court affirmed that district court decision in part. They found that the NCAA contract with television networks for the purpose of the broadcast of college football restricted output and fixed prices in violation of antitrust laws. The court applied the rule of reason analysis, noting probable review by the Supreme Court. They found that the control by NCAA unreasonably restricted competitive conditions because it resulted in increased concentration in the market place, prevented independent price, and prevented broadcasters from purchasing a product where no available substitute exists. However, the court reversed a portion of the lower court's ruling and held that the television plan and network contracts were not a group boycott under section 1 of the Sherman Antitrust Act, given the open bidding opportunities of all television networks. The Supreme Court has granted certiorari (*supra* note 151).

---

[150] 15 U.S.C. §§ 1-2 (1980).

[151] Board of Regents of Univ. of Oklahoma v. National Collegiate Athletic Ass'n, 707 F.2d 1147 (10th Cir. 1983), *cert. granted*, 104 S. Ct. 272 (1983).

[152] *See* YEARBOOK 1983 at 320; Board of Regents of Univ. of Oklahoma v. National Collegiate Athletic Ass'n, 546 F. Supp. 1276 (W.D. Okla. 1982).

TABLE OF CASES

Aasmundstad v. Dickinson State College, 303
Abood v. Detroit Bd. of Educ., 56, 301
Abrahamson v. Hershman, 118
Abram v. City of Fayetteville, 249
Abrams v. Board of Educ., City of Yonkers, 70-71, 103, 110
Abston v. Woodward, 25
Ace Plumbing & Heating, Inc. v. Helena Flats School Dist., 256-57
Acklie v. Jensen, 247
Acmat Corp. v. Daniel O'Connell's Sons, Inc., 254
Adams Cent. School Dist. No. 090 v. Deist, 118, 129
Adams v. Richardson, 282
Aguillard v. Treen, 2, 161
Aio v. Hamada, 58, 102
Alabama State Tenure Comm'n, *ex parte*, 51-52
Alaska Commun. Colleges Fed'n of Teachers, Local No. 2404 v. University of Alsaka, 72
Alba v. Los Angeles Unified School Dist., 103
Alderstein v. Board of Educ., City of New York, 90
Alexander v. Delano Joint Union High School Dist., 43
Allen v. Scherer, 306
Altus-Denning School Dist. No. 31 v. Franklin Cty., 226-27, 261-62
Alyseka Pipeline Serv. Co. v. Wildnerness Soc'y, 130-31
American Future Sys., Inc. v. Pennsylvania State Univ., 307-08
American Future Sys., Inc. v. State Univ. of Cortland, 308
Americans United for Separation of Church and State v. School, 158
Ames Contracting Co. v. City Univ. of New York, 271
Andersen v. University of Rochester, 274
Anderson v. Central Point School Dist. No. 6, 210
Anderson v. Thompson, 130, 131
Angier v. Anrig, 120
Antilles Council of School Officers, Local 68, Am. Fed'n of School Adm'rs, AFL-CIO v. Lehman, 62-63
Armstrong v. Harrell, 243
Arnold v. Hayslett, 193
Arrendono v. Brockette, 135
Arthur v. Nyquist, 20, 169
Ash v. Board of Educ., Woodhaven School Dist., 61, 108
Association of Indep. Professionals v. Maine Labor Rels. Bd., 57
Association for Retarded Citizens of North Dakota v. Olson, 127-28
Association of Cuyahoga Cty. Teachers of Trainable Retarded v. Cuyahoga Cty. Bd. of Mental Retardation, 65
Auerbach v. Council Rock School Dist., 192
Aurora East Pub. School Dist. v. Cronin, 178

Babcock School Dist. v. Patocki, 138
Bailey v. Ferndale Area School Dist., 85, 106, 108
Bailey v. Unified School Dist. No. 345, 123
Ball v. District No. 4, Area Bd. of Voc.-Tech. Educ., 269
Banks v. Board of Educ. of Letcher Cty., 31
Barry v. Blue Springs R-IX School Dist., 41 211
Bartley v. Special School Dist. of St. Louis Cty., 189
Bass v. Gilchrist Cty. School Bd., 45
Battle v. Pennsylvania, 125
Beatley v. Board of Trustees of Ohio State Univ., 277
Beebe School Dist. v. National Supply Co, 255
Beecher v. White, 266
Beil v. Russo, 244-45
Belcher v. Mansi, 9, 68
Bell v. Board of Educ., 51
Bell v. New Jersey and Pennsylvania, 225
Bender v. Williamsport Area School Dist., 157
Benke v. Neenan, 40
Benner v. Negley, 133
Bennet v. Livermore, 156
Benton v. Gwinnett Cty. Bd. of Educ., 168
Bentworth School Dist. v. Workmen's Compensation Appeal Bd., 199-200
Berman v. Philadelphia Bd. of Educ., 186
Berna v. Monroe Commun. College, 274
Berry v. School Dist. of City of Benton Harbor, 172-73, 261
Bethel School Dist. v. Skeen, 37
Bickford v. Board of Educ., 38

Billings v. Wichita State Univ., 290
Birmingham and Tanphere School Dists. v. Michigan Superintendent of Pub. Instr., 126
Black v. Brown Univ., 287
Black v. Sullivan, 304-05
Blackmon v. Harland, 11
Blazejewski v. Board of Educ. of Allegany Cent. School Dist., 121
Bliss v. Holmes, 56
Bloom v. Board of Coop. Educ. Servs., 51
Blue River Valley School Corp. v. Renfro, 48
Board of Dirs. of South Winneshiek v. Sexton, 40
Board of Educ., Bremen Commun. High School Dist. No. 228 v. Bremen Dist. No. 228 Joint Faculty Ass'n, 74
Board of Educ., Caroll City v. Carroll City Educ. Ass'n, 81
Board of Educ., Connetquot Cent. School Dist., *In re*, 94
Board of Educ., Connetquot Cent. School Dist. v. Connetquot Teachers Ass'n, 243-44
Board of Educ., Elwood Union Free School Dist. v. Elwood Teachers' Alliance, 84, 89, 97
Board of Educ., Farmingdale Union Free School Dist. v. Farmingdale Fed'n of Teachers, 83, 88, 105
Board of Educ., Hamilton City School Dist. v. Hamilton Classroom Teachers' Ass'n, 107
Board of Educ., Hauppauge Union Free School Dist. v. Ambach, 144, 216
Board of Educ., Meridian Commun. Unit School Dist. No. 101 v. Meridian Educ. Ass'n, 64, 104
Board of Educ., North Palos Elem. School Dist. No. 117 v. Williams, 95
Board of Educ., Porterville Cent. School v. Porterville Faculty Ass'n, 97
Board of Educ., Twp. of Branchburg v. Township Comm. of Twp. of Branchburg, 236-37
Board of Educ. of Arbor Park School Dist. No. 145, Cook Cty. v. Ballweber, 84, 108
Board of Educ. of City of Chicago v. Industrial Comm'n, 197-98
Board of Educ. of Detroit v. Parks, 57, 59, 69, 74
Board of Educ. of Dover Union Free School Dist. v. Dover-Wingdale Teachers' Ass'n, 89, 101, 102, 131
Board of Educ. of Fairfield v. Connecticut State Dep't of Educ., 121
Board of Educ. of Granite Dist. v. Salt Lake City, 237-38
Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 116
Board of Educ. of Millbrook Cent. School Dist. v. Ambach, 165
Board of Educ. of New Britain v. Connecticut State Bd. of Educ., 122
Board of Educ. of Niles Twp. v. Board of Educ. of Northfield Twp., 13-14, 136
Board of Educ. of Northport-East Northport Union Free School Dist. v. Ambach, 166
Board of Educ. of Rocky Point v. Ambach, 122
Board of Educ. of School Dist. No. 131 v. Illinois State Bd. of Educ., 37
Board of Educ. v. Allen, 144, 214
Board of Educ. v. Ambach, 206
Board of Educ. v. Morris, 32
Board of Educ. v. Ozark School Dist. No. 14, 246
Board of Educ. v. School Comm. of Amesbury, 124
Board of Educ. v. Vail, 207-08
Board of Regents of N. Texas State Univ. v. Denton Constr. Co., 272
Board of Regents of Univ. of Oklahoma v. National Collegiate Athletic Ass'n, 317-18
Board of School Comm'rs of City of Indianapolis v. Eakin, 239
Board of Trustees of Bergen Commun. College v. J.P. Fyfe, Inc., 271
Board of Trustees of Ohio State Univ. v. Kinney, 272
Board of Trustees, Commun. School Dist. No. 513 v. Krizek, 60, 82
Bob Jones Univ. v. United States, 280-81
Boces III Faculty Ass'n, N.Y.S.U.T., AFT, AFL-CIO v. Public Employment Rels. Bd., 64
Bohmann v. Board of Educ. of West Clermont, 45
Boston Teachers' Union, Local 66 v. Mayor of Boston, 76, 235-36
Boulet v. Brunswick Corp., 192
Brais v. Board of Educ. of Massena, 35
Brandywine Affiliate v. Board of Educ. of Brandywine School Dist., 32
Brantley v. Surles, 25, 209-10
Breman v. Philadelphia Bd. of Educ., 192-93
Briganti v. Harrison Cent. School Dist., 194
Brinkley v. City Univ. of New York, 274

Bristol Twp. Educ. Ass'n v. Bristol Twp. School Dist., 101

Broadalbin Teachers' Ass'n v. Broadalbin Cent. School Dist., 96-97

Bronson v. Board of Educ. of Cincinnati, 170

Brookhart v. Illinois State Bd. of Educ., 165-66

Brooks v. School Bd. of City of Richmond, 208-09

Brosnan v. Livonia Pub. Schools, 191

Brotherhood of Firemen and Oilers, Local No. 1201, AFL-CIO v. Board of Educ., School Dist. of Phildelphia, 76-77, 81

Brown v. Alexander, 69

Brown v. Casier, 90

Brown v. Fairleigh Dickinson Univ., 288

Brown v. North Carolina Wesleyan College, 273

Bruckner v. Lancaster Cty. Area Voc.-Tech., 47

Bruno v. Zwirkoski, 7, 244

Bryam Hills Cent. School Dist. v. State Ins. Fund, 196

Bryan L., *In re* 124

Bryan v. Florida, 274

Bryant v. St. Helena Parish School Bd., 27, 211

Bucks Cty. Schools, Intermediate Unit No. 22 v. Pennsylvania Labor Rels. Bd., 64

Buenzow v. Lewiston-Porter Cent. School Dist., 51

Bunting v. City of Columbia, 145

Burke Cty. Pub. School Bd. of Educ. v. Juno Constr. Corp., 253

Burris v. Willis Indep. School Dist., 27

Butte Teachers' Union Local No. 332, AFL-CIO v. Board of Trustees, Butte School Dist. No. 1, Silver Bow Cty., 70

C.J. v. School Bd. of Broward Cty., 164

Cain v. Yukon Pub. Schools, 120

Calhoun v. Illinois State Bd. of Educ., 207

California Area School Dist. v. Pennsylvania State Employees' Ass'n, 107

California School Employees' Ass'n v. Oakland Unified School Dist., 88, 100

California Teachers' Ass'n v. Governing Bd. of Cent. Union School Dist., 46

California Teachers' Ass'n v. Governing Bd. of Gustine, 47, 111

California Teachers' Ass'n v. Governing Bd. of Livingston Union School Dist., 39

Campbell v. Joint Dist. No. 28-J, 9-10, 240

Candid Enterprises, Inc. v. Grossmont Union High School Dist., 250

Cannon v. Beckville Indep. School Dist., 28

Cannon v. University of Chicago, 304

Cannon v. University of Health Sciences/Chicago Medical School, 304

Cape Elizabeth School Bd. v. Cape Elizabeth Teachers' Ass'n, 62, 84, 105

Carbone v. Overfield, 189

Carder v. Michigan City School Dist., 137

Cardinal Glass Co. v. Board of Educ. of Mendota Commun. Consol. School Dist. No. 289, 251

Caristo Constr. Corp. v. Board of Educ., 255

Carpenter v. Stephen F. Austin State Univ., 285-86

Carroll v. Capalbo, 122

Carson v. Orleans Parish School Bd., 186

Cartwright v. Garrison, 201-02

Case Prestressing Corp. v. Chicago College of Osteopathic Medicine, 271

Catalono v. Pechous, 204

Cathedral of Incarnation v. Glimm, 250

Catholic High School Ass'n, Archdiocese of New York v. Culvert, 61

Celestin v. Fireman's Fund Ins. Co., 198

Central Susquehanna Intermediate Unit Educ. Ass'n v. Central Susquehanna Intermediate Unit No. 16, 102

Cheyney State College Faculty v. Hufstedler, 281-82

Chicago Heights Pub. School Dist. v. Illinois State Bd. of Educ., 178

Chicago Teachers' Union v. Board of Educ., Chicago, 100

Christopher N. v. McDaniel, 132-33

Christopher T. v. San Francisco Unified School Dist., 121

Cinnaminson Twp. Bd. of Educ. v. United States Gypsum, 194, 204

Citadel Development Found. v. County of Greenville, 273

Citizens to Save Minnewaska v. New Paltz Cent. School Dist., 263

City Nat'l Bank of Kankakee v. Shott, 14, 247

City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Rels. Comm'n, 157

City of New Orleans v. Orleans Parish School Bd., 239

City of Newport v. Fact Concerts, 206

Civil Serv. Employees' Ass'n v. Newman, 67-68, 102

Clark v. Arizona Interscholastic Ass'n, 147-48

Clark v. Board of Educ. of Little Rock, 168-69

Clark v. Huntsville City Bd. of Educ., 21

Clarke v. Board of Educ. of Omaha, 35

Clarke v. West Virginia Bd. of Regents, 299

Cleveland City School Dist., *In re*, 248

Clevenger v. Oak Ridge School Bd., 117

Cloud v. Trustees of Boston Univ., 311
Coalition to Preserve Educ. on Westside v. Kansas City School Dist., 5, 259
Coats v. Board of Educ., 42
Colin K. v. Schmidt, 117
Collins v. School Dist. No. 189, 196
Columbus Bd. of Educ. v. Penick, 170
Commissioners of Admin. v. Local 509, Serv. Employees' Int'l Union, AFL-CIO 64
Coney Island v. Pottsville Area School Dist., 229-30
Conley v. Ambach, 98
Connell v. Board of Educ., 50
Connelly v. Gibbs, 124
Connick v. Meyers, 27, 60
Corporation of Windham College v. Town of Putney, 276-77
Cort v. Ash, 128
Cothern v. Mallory, 122
Coull v. Spearfish Bd. of Educ., 32-33
County Hills Christian Church v. Unified School Dist. No. 512, 158, 243
County Tax Levy by Saunders Cty., *In re* 232
Coveney v. President & Trustees of College of Holy Cross, 311
Crawford v. Board of Educ., 46
Crawford v. Pittman, 125-26, 224
Crescent Bus Corp. v. Board of Educ. of New York City, 16
Crestwood School Dist. v. Topito, 259
Crockett v. Sorenson, 160-61
Crossland v. Bensalem Twp. School Dist., 38
Crow v. McAlpine, 239
Crowston v. Jamestown Pub. School Dist., 23
CUNY-Hostos Commun. College v. State H.R.A.B., 300

D.S. v. Board of Educ. of Twp. of East Brunswick, 123
Dallastown Area School Dist. v. Pennsylvania Human Rel. Comm'n, 23
Danville Educ. Ass'n v. Danville Area School Dist., 105
Danzl v. North St. Paul-Maplewood-Oakdale Indep. School Dist., 22
Darlene L. v. Illinois Bd. of Educ., 127
Daul v. Board of Educ. of Mahopac, 45
David H. v. Spring Branch Indep. School Dist., 132
Davidson v. Winston-Salem/Forsyth Cty. Bd. of Educ., 40
Davis v. Barr, 31
Davis v. Board of Educ. of Harrison Cty., 50
Davis v. East Baton Rouge Parish School Bd., 174-75, 260
Davis v. Houston Indep. School Dist., 199
Dayton Bd. of Educ. v. Brinkman, 170
De Bellis v. Commissioner of Educ., 52
Deal v. Cincinnati Bd. of Educ., 170
Deboard v. Owen, 233
Debra P. v. Turlington, 167
Decker v. Hampton, 59, 66, 107, 110
Delconte v. North Carolina, 140
Delta Sp. School Dist. v. McGehee Sp. School Dist., 136
Dermott Sp. School Dist. v. Brown, 238
Derrickson v. Board of Educ. of City of St. Louis, 28
d'Errico v. Lesmeister, 307
Deshotels v. State Professional Improvement Comm., 48
Diaz v. San Jose Unified School Dist., 167-68
Dickinson v. Fund for Support of Free Pub. Schools, 224
Dillon v. Mingo City Bd. of Educ., 110
Dinnan, *In re*, 282
Dionisio v. Mahopac Cent. School Dist., 44
District Bd. of Trustees v. Allen, 269
District of Columbia v. Cassidy, 183-84
District of Columbia v. Royal, 187, 266
Doe v. Aldine Indep. School Dist., 155
Doe v. Anrig, 120-21
Doe v. Koger, 133, 207
Doe v. Renfrow, 149
Dombroske, *In re*, 259
Donnes v. Montana, 35
Donovan v. Shenandoah Baptist Church, 61
Dougherty Cty. School Sys. v. Bell, 226
Drake v. Department of Human Servs., 122
DuPree v. Alma School Dist. No. 30, 220-21
Duffy v. Las Cruces Pub. Schools, 155
Duke Univ. v. American Arbitration Ass'n, 271-72
Dupree v. School Comm. of Boston, 38
Duro v. District Attorney, 140

EEOC v. University of Notre Dame Du Lac, 282-83
EEOC v. University of Oklahoma, 291-92
EEOC v. Wyoming, 280
Earnest v. School Bd. of Indep. Dist. No. 16, 47, 99-100
East Pennsboro Area School Dist. v. Pennsylvania Labor Rels. Bd., 83, 108
East Ramapo Cent. School Dist. v. East Ramapo Teachers' Ass'n, 91
Eastbrook Commun. Schools Corp. v. Indiana Educ. Employment Rels. Bd., 81
Educational Fin. Comm'n v. Jackson Cty. School Dist., 248
Ehlinger v. Board of Educ., 186, 267
El Dorado Union High School Dist. v. City of Placerville, 249-50

El Rancho Unified School Dist. v. National Educ. Ass'n, 107, 109
Elbe v. Yankton Indep. School Dist. No. 1, 159-60, 214-15
Elizando v. Williams, 75
Elkhorn Area School Dist. v. East Troy Commun. School Dist., 237, 264
Ende v. Board of Regents of N. Illinois 290-91
Engle v. Vitale, 154
English v. National Collegiate Athletic Ass'n, 314
Enright v. Board of School Dirs., 207
Epperson v. Arkansas, 162
Eric G., *In re*, 134
Evangelical Teacher Training Ass'n v. Novak, 262
Everett v. Board of Educ. of Hampton, 40
Everson v. Board of Educ., 143
Ewing v. Board of Regents of Univ. of Michigan, 312-13

F.U.S.A., FTP-NEA v. Hillsborough Commun. College, 86
Fairfield Twp. Bd. of Educ. v. Kean, 221-22
Fairview School Dist. v. Commonwealth Unemployment Compensation Bd., 108
Fallis v. Ambach, 123
Fanelli, Antuzzi, Bonacorsi Painting, Inc. v. Santa Clara Unified School Dist., 251
Fannin v. Williams, 144
Fasano v. School Bd., 255
Faucher v. City of Auburn, 265
Faulkner v. New Bern-Craven Cty. Bd. of Educ., 37
Fedorcyzk v. New York Univ., 275
Fenton Area Pub. Schools v. Sorensen-Gross Constr. Co., 252
Feree v. Board of Educ., Benton Commun. School Dist., 90
Ferris v. Los Rios Commun. College Dist., 298
Ferris v. Paulding Exempted Village School Dist. Bd. of Educ., 3, 245
Ferris v. University of Texas at Austin, 314
Fisher v. City of Tucson, 292
Fisher v. Larsen, 202-03, 111-12
Fiske v. MacGregor Div. of Brunswick, 195
Fitzpatrick v. Board of Educ., 39
Flavin v. Connecticut State Bd. of Educ., 132
Flax v. Potts, 177, 261
Fleming v. Vance Cty. Bd. of Educ., 30
Fletcher v. Washington & Lee Univ., 276
Florida v. D.T.W., 152
Flores v. Edinburg Consol. Indep. School Dist., 208
Florian v. Highland Local School Dist., 37
Florida High School Activities Ass'n v. Thomas, 146
Fogarty v. School Comm. of Palmer, 87, 91
Force v. Pierce City R-VI School Dist., 148
Ford v. School Dist. of Philadelphia, 71
Forgarty v. School Comm. of Palmer, 44
Forrest v. Ambach, 26
Fort Wayne Educ. Ass'n v. Goetz, 59, 81
Fountain Gate Ministries, Inc. v. City of Plano, 270
Fowler v. Board of Regents of Cent. Missouri State Univ., 274
Franklin v. Pawley, 265
Frazier v. Lowndes Cty. Bd. of Educ., 268
Freeholder Petition, *In re*, 137
Fullerton Union High School Dist. v. Riles, 222-23

Galbreath v. School Bd. of Broward Cty., 71, 86
Garcia v. Albuquerque Pub. Schools, 200
Garcia v. University of Kansas, 293
Garner Pub. School Dist. No. 10 v. Golden Valley Cty. Comm., 2-3
Gary B., *In re*, 124
Garza v. Brownville Indep. School Dist., 22
George Washington Univ. v. Weintraub, 275
Georgia Ass'n of Retarded Citizens v. McDaniel, 125
Georgia NAACP v. Georgia, 177
Gere v. Council Bluffs Commun. School Dist., 47
Gilbert v. Nampa School Dist. No. 131, 71-72, 101
Gillespie v. Southern Utah State College, 316
Gladney v. Thomas, 296-97
Gmuer v. Garner, 294
Goldsmith v. Lower Moreland School Dist., 137
Goose Creek Consol. I.S.D. v. Continental Cas. Co., 196-97
Goose Creek Indep. School Dist. v. Horton, 149
Gordon v. Warren Consol. Bd. of Educ., 24-25, 162, 211
Goss v. Lopez, 163
Grames v. King, 192
Graner Pub. School Dist. No. 10 v. Golden Valley Cty. Comm. for Reorg. of School Dist., 247
Granite Nutrition Coalition v. Board of Educ. of Granite School Dist., 225-26
Grant v. Spellman, 56
Gray v. Board of Higher Educ., 282

Gray v. Dade Cty. School Bd., 200
Greater Garden Avenue Area Ass'n v. City of Webster Groves, 269-70
Green v. Board of School Comm'rs of Indianapolis, 35
Greenburg v. Lower Merion School Dist., 233
Greenspan v. Dutchess Cty. Bd. of Coop. Educ. Servs., 51
Gregory v. Board of Elections of New York City, 12
Griffen v. Big Spring Indep. School Dist., 210
Grigg v. Virginia, 139
Grimes v. Eastern Illinois Univ., 302
Grove City College v. Bell, 288
Guillaume v. Staum, 189
Gurule v. Salt Lake City Bd. of Educ., 188, 265

Haag v. Hogue, 58
Halderman v. Pennhurst State School, 123
Hall v. Board of School Comm'rs of Conecuh Cty., 161
Hamblen Cty. v. City of Morristown, 6-7, 244
Hamburg v. Commissioner, Dep't of Educ., 40
Hamm v. Board of Regents of State of Florida, 287
Hampton v. Orleans Parish School Bd., 184
Hardiman v. Jefferson Cty. Bd. of Educ., 29-30
Harris v. Bauer, 50
Harris v. Birmingham Bd. of Educ., 20
Harris v. Hall, 135
Harris v. Trustees of Columbia Univ., 276
Harrisburg School Dist. v. Pennsylvania, 20
Harrison v. Escambia Cty. School Bd., 189, 265
Harrison v. Motgomery Cty. Bd. of Educ., 194-95
Harrison-Washington Commun. School Corp. v. Bales, 39-40
Hartman v. Board of Trustees of Univ. of Alabama, 310-11
Hartzell v. Connell, 228
Hawaii Dep't of Educ. v. Carl D., 134
Hawley v. South Orangetown Cent. School Dist., 47
Hays Consol. Indep. School Dist. v. Valero Transmission Co., 234-35, 264
Haysville Unified School Dist. No. 261 v. GAF Corp., 195, 252
Hedron Constr. Co. v. District Bd. of Trustees, 270
Heisey v. Elizabethtown Area School Dist., 244
Henson v. Honor Comm. of Univ. of Virginia, 313
Hessler v. State Bd. of Educ. of Maryland, 116
Hicks v. Stone, 303
Hillsborough Classroom Teachers' Ass'n v. School Bd. of Hillsborough Cty., 78, 81
Hodel v. Virginia Mining and Reclamation Ass'n, 280
Hogencamp v. Lee Cty. Bd. of Educ., 10
Holloway v. Madison-Grant United School Corp., 199
Homer v. Commissioner, Dep't of Educ., 53
Hoots v. Pennsylvania, 171
Hornbeck v. Somerset Cty. Bd. of Educ., 217-19
Horowitz v. Board of Educ., East Ramapo Cent. School Dist., 52, 97
Horton v. Goose Creek Indep. School Dist., 149
Hotel, Motel, Restaurant Employees and Bartenders Union Local 737, AFL-CIO v. Escambia Cty. School Bd., 74
Hudson v. Chicago Teachers' Union, Local No. 1, 59
Hunt v. Scotia-Glenville Cent. School Dist., 147, 185
Hurry v. Jones, 133
Husted v. Canton Area School Dist., 33
Hynes v. Board of Educ. of Bloomfield, 23

Indian Educ. Employment Rels. Bd. v. Mill Creek Classroom Teachers' Ass'n, 106
Ingram v. Boone, 240-41
Insurance Co. of North America v. State Farm Mutual Auto. Ins. Co., 196
Inwang v. Community College Dist. No. 508, 299
Iron Arrow Honor Soc'y v. Heckler, 309
Iron Arrow Honor Soc'y v. Hufstedler, 309
Irwin v. Board of Educ., 30
Italiano v. City of Syracuse, 250
Izzard Cty. Bd. of Educ. v. Violet Hill School Dist. No. 1, 13

Jacker v. School Bd. of Dade Cty., 36
Jackson v. Board of Educ. of City of Chicago, 190
Jackson v. Hazlehurst Mun. Sep. School Dist., 33-34, 59, 66
Jacobsen v. District of Columbia Bd. of Educ., 120
Jaffree v. Board of School Comm'rs of Mobile Cty., 154
Jaffree v. Wallace, 154
James v. Charlotte-Mecklenburg Bd. of Educ., 183

Janasiewicz v. Board of Educ. of Cty. of Kanawha, 143, 216
Janzen v. Norquest, 246
Jefferson Twp. Educ. Ass'n, *In re*, 85-86
Jewish Bd. of Guardians v. Grumman Allied Indus., Inc., 254
John A. v. Gill, 128
John F. Harkins Co. v. School Dist., 255-56
Johns Const. Co. v. Unified School Dist. No. 210, 256
Johnson v. Stuart, 161-62
Johnson v. Southern Greek Housing Corp., 272
Johnston v. Ann Arbor Pub. Schools, 117
Jones v. Board of Governors of Univ. of North Carolina, 313
Jones v. Caddo Parish School Bd., 176-77
Jones v. Los Angeles Commun. College Dist., 302-03
Jones v. Sully Buttes Schools, 39
Jose P. v. Ambach, 128-29
Joseph B., *In re*, 268

Kain v. Rockridge Commun. Unit School Dist., 191
Kania v. Fordham, 310
Kansas Bd. of Regents v. Pittsburg State Univ. Chapter, Kansas Nat'l Educ. Ass'n, 78-79, 81
Kanter v. Community Consol. School Dist., 29
Kaufman v. Board of Trustees, Commun. College, 298-99
Kaufmann Farms, Inc. v. Hutsell, 14
Keeler v. Iowa State Bd. of Pub. Instr., 258
Kelland v. Commissioner of Educ., 50-51
Keller v. Gardner Commun. Consol. Grade School Dist., 146-47
Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 173
Kelly v. Day Care Center, Inc., 67
Kelly v. School Bd., 252
Kennewick Educ. Ass'n v. Kennewick School Dist., 105
Kerr Center Parents Ass'n v. Charles, 129
Keyes v. School Dist. No. 1, 171-72
King v. Iowa Civil Rights Comm'n, 27
Kline v. Ball, 188
Klinger v. Board of Educ. of Cranbury, 44
Klipa v. Board of Educ. of Anne Arundel Cty., 205-06
Knight v. Minnesota Commun. College Faculty Ass'n, 57-58, 310
Knighton v. Laurens Cty. School Dist., 21
Knox College v. Celotex Corp., 270-71
Knudson v. Boundary Cty. School Dist., 49
Konald v. Board of Educ. of Commun. Unit School Dist. 220, 247-48
Kromnick v. School Dist. of Philadelphia, 20
Krynicky v. University of Pittsburgh, 297
Kudasik v. Board of Dirs., 40-41
Kuhle v. Ambach, 36
Kuhn v. Vergiels, 305-06
Kumar v. Board of Trustees of Univ. of Massachusetts, 295
Kureshy v. CUNY, 287
Kurlander v. School Comm. of Williamstown, 35
Kush v. City of Buffalo, 185, 265
Kutztown State College v. Degler-Whiting, Inc., 277

L.L., *In re*, 152
L.R. Foy Constr. Co. v. Spearfish School Dist. No. 40-2, 257
LaBelle v. San Francisco Unified School Dist., 51
Lal v. West Chester Area School Dist., 233-34
Lamphear v. New York, 316
Larson v. Board of Educ., Bement Commun. School Dist., 10
LeGalley v. Bronson Commun. Schools, 29
Leapley v. Board of Regents, Florida State Univ. Sys., 64, 105
Lee v. Big Flat Pub. Schools, 31-32
Leftwich v. Harris-Stowe State College, 288
Lehnert v. Ferris Faculty Ass'n, M.E.A.-N.E.A., 58
Lemelle v. Louisiana, 185
Lemon v. Kurtzman, 142, 154, 213, 307
Lewis v. Hatboro-Horsham School Dist., 192, 266
Lexington Educ. Ass'n v. Town of Lexington, 99
Lichtman v. Board of Educ., 44
Liddell v. Board of Educ., St. Louis, 169-70
Lillian S. v. Ambach, 120
Lincoln Educ. Ass'n v. School Dist. City of Lincoln, 61, 64-65, 74, 101, 102
Lincoln v. Board of Regents of Univ. Sys. of Georgia, 287
Lindsay v. Thomas, 134
Link v. Antioch Unified School Dist., 57, 59, 69, 74
Lister v. Hoover, 305
Little Rock School Dist. v. Pulaski Cty. Sp. School Dist., 171
Livingston Parish School Bd. v. Lofton, 141
Long Island Univ. Faculty Fed'n, Local 3998 N.Y.S.U.T., AFT, AFL-CIO v. Board of Trustees, Long Island Univ., 102
Longoria v. Harris, 24

Lookabill v. Board of Educ., 28
Louisiana Ass'n of Educators v. St. Tammany Parish School Bd., 100
Loya v. Desert Sands Unified School Dist., 27
Lyon v. Temple Univ., 291
Lyznicki v. Board of Educ., 28-29

Madison Teachers, Inc. v. Wisconsin Employment Rels. Comm'n, 101
Maida v. Ambach, 32
Maine v. Thibotout, 206-07
Maine-Endwell Teachres Ass'n v. Maine-Endwell Cent. School Dist., 44
Maki v. Commissioner of Educ., 23
Mamos v. School Comm. of Town of Wakefield, 23
Manecke v. School Bd. of Pinellas Cty., 132
Manges v. Freer Indep. School Dist., 230, 264
Manor Indep. School Dist. v. Leachelle, 122
Maple Heights Teachers' Ass'n v. Maple Heights Bd. of Educ., 46, 99
Marine Midland Bank v. Greenblatt, 263
Marland v. Ambach, 103
Marrion H. v. Austin Indep. School Dist., 119
Marston v. Wood, 293
Martin v. Orleans Parish School Bd., 198
Martin v. School Bd. of Gadsden Cty., 33
Martinez v. Bynum, 134-35, 227
Martinez v. Democrat-Herald Publishing Co., 205
Marvin H. v. Austin Indep. School Dist., 131, 207
Mason v. Thetford School Bd., [Ch. 4, note omitted from 136]
Mattison v. Hudson Falls Cent. School Dist., 187, 267
Maurice River Twp. Bd. of Educ. v. Maurice River Twp. Teachers' Ass'n, 68
Max M. v. Thompson, 134
May v. Cooperman, 155-56
McGee v. South Pemiscot School Dist., 25
McKenzie v. Jefferson, 127
McKenzie v. Johnson, 272
McLain Western No. 1 v. County of San Diego, 250
McLaughlin v. Board of Educ., 34-35
McMillan v. Rust College, 288
Medford Assembly of God v. City of Medford, 250-51
Meek v. Pittenger, 159, 214
Melani v. Board of Higher Educ. of City of New York, 283-84, 289
Members of Jamestown School Comms. v. Schmidt, 142-43, 215-16
Menkes v. City of New York, 71
Mercer v. Texas, 153
Merged Area (Educ.) VII v. Board of Rev., 262
Merrill v. Birhanzel, 189
Merritt Meridian Constr. Corp. v. Gallagher, 245
Messer v. Polk Cty. Dist. Boundary Bd., 248
Mesvita of Forest Hills Inst. v. City of New York, 268
Metropolitan School Dist. of Martinsville v. Mason, 16
Meyerson v. Arizona, 292
Michael M. v. County Super. Ct., 147
Michigan Coaches' Ass'n, Warren Consol. School Dist. Local No. 1 v. Warren Consol. Schools' Bd. of Educ., 63, 102
Michigan Educ. Support Personnel Ass'n v. Evart Pub. Schools, 66-67
Middlesex Cty. Sewage Auth. v. National Sea Clammers Ass'n, 292
Milan School Dist., *In re*, 122
Miller v. New York, 315
Minnesota Commun. College Bd. v. Knight, 301
Minooka High School Educ. Ass'n v. Board of Educ., Minooka Commun. High School Dist. No. 111, 69
Mississippi Univ. for Women v. Hogan, 147
Mitchell School Dist. No. 17-2 v. Welfl Constr. Co., 253
Mitchell v. Board of Educ., 31
Moberg v. Independent School Dist. No. 281, 8-9, 258
Moffitt v. Batesville School Dist., 34
Moncrieffe, *In re*, 136
Monell v. New York City Dep't of Social Servs., 206
Montag v. Board of Educ., 190-91
Montgomery v. Boshears, 297
Montoya v. Lopez, 11
Moreno Valley Unified School Dist. v. Public Employment Rels. Bd., 73, 106-07
Mortel v. Independent School Dist. No. 831, Forest Lake Pub. Schools, 108
Mount Healthy City Bd. of Educ. v. Doyle, 26, 66
Mountain View-Los Altos Union High School v. Sharron B.H., 118
Mueller v. Allen, 156, 159, 212-14
Muldrow v. Pinkley, 92
Murphy v. Pennsylvania Dep't of Educ., 124

NLRB v. Northeastern Univ., 65
NLRB v. Catholic Bishops of Chicago, 290

Napoleon Educ. Ass'n v. Napoleon Commun. Schools, 26, 59, 67
Naragon v. Wharton, 308-09
National League of Cities v. Usery, 280
National Union of Hospitals v. Southeast Volusia Hospital Dist., 72
Neish v. John Deere Co., 316
Neshaminy Fed'n of Teachers v. Neshaminy School Dist., 83, 85, 96
New Braunfels Indep. School Dist. v. Armke, 164
New Castle Cty. Voc.-Tech. Educ. Ass'n v. Board of Educ., New Castle Cty. Voc.-Tech. School Dist., 61, 106, 211
New Haven Bd. of Educ. v. New Haven Fed'n of Teachers, Local 933, 92
New Mexico v. Edgington, 141
New Paltz Cent. School Dist. v. Reliance Ins. Co., 254
New Reigel Local School Dist., *In re*, 2, 245
New York Univ. v. Molner, 275
Niagara Mohawk Power Corp. v. City School Dist. of City of Troy, 235
Nicholson v. Board of Educ. of Torrance Unified School Dist., 162
Nicholson v. Board of Educ., 194
Nicolet High School Dist. v. Nicolet Educ. Ass'n, 104
Nicolcosi v. Livingston Parish School Bd., 266
Niles v. University Interscholstic League, 145
Nodar v. Galbreath, 203
Norcross v. Sneed, 23-24
North Dakota v. Rivinius, 139
North Haven v. Bell, 288-89, 309
North Smithfield Teachers' Ass'n v. North Smithfield School Comm., 91, 101, 102
Northern Michigan Educ. Ass'n v. Board of Educ., Cheboygan Area Schools, 101, 103
Northwest Tri-Cty. Intermediate Unit No. 5 Educ. Ass'n v. Northwest Tri-Cty. Intermediate Unit No. 5, 64
Novod v. Board of Examiners, 53
Nusz v. Board of Coop. Educ. Servs., 44

O'Hara v. School Bd. of Sarasota Cty., 158-59
Occhipinti v. Board of School Dirs. of Old Forge, 53
Ogilive v. Independent School Dist. No. 341, 73-74, 95
Ohio Ass'n of Pub. School Employees, Chapter 672 v. Twin Valley Local School Dist. Bd. of Educ., 98
Ohio Civil Serv. Employees' Ass'n v. University of Cincinnati, 59, 69
Ohio Univ. Faculty Ass'n v. Ohio Univ., 60
Okeson v. Tolley School Dist. No. 25, 210
Olds v. Board of Educ., Nashua Commun. School Dist., 41, 61, 94
Oliver v. Kalamazoo Bd. of Educ., 21
Ollman v. Toll, 293-94
Oregon Educ. Ass'n v. Eugene School Dist. No. 4J, 108
Orshan v. Macciarola, 30
Osterndorf v. Turner, 231
Other v. Ann Arbor School Bd., 148-49
Otselic Valley Cent. School Dist. v. Otselic Valley Teachers' Ass'n, 92
Ottawa Educ. Ass'n v. Unified School Dist., 48, 74
Owen v. City of Independence, 206

Palm Beach Junior College Bd. of Trustees v. United Faculty of Palm Beach Junior College, 80-83
Paloumpis v. Onondaga Commun. College Fed'n of Teachers, AFT Local 1845, 84 89
Pape v. New York, 316
Parker v. Board of School Comm'rs of City of Indianapolis, 22
Parks v. W.C.A.B., 199
Parochial Bus Sys., Inc. v. Board of Educ., City of New York, 15-16, 107-08
Parratt v. Taylor, 208
Parsippany-Troy Hills Educ. Ass'n v. Board of Educ., 6, 93, 104, 228-29
Patterson v. Greenwood School Dist., 22
Paul v. Metropolitan School Dist., 48
Peacock v. Board of School Comm'rs, 259-60
Pelham v. Whaley, 36
Peng-Fei Chang v. University of Rhode Island, 284-85
Pennhurst State School & Hosp. v. Halderman, 207, 292
Pennsylvania Interscholastic Athletic Ass'n v. Greater Johnstown School Dist., 145-46
Pennsylvania State Educ. Ass'n v. Appalachia Intermediate Unit No. 8, 104
Pennsylvania v. Hall, 141
Pennsylvania v. Pennsylvania Labor Rels. Bd., 79
People *ex rel.* v. Walgenbach, 229, 248-49
People v. Overton, 151
Pequea Valley School Dist. v. Pennsylvania Dep't of Educ., 143
Peques v. Morehouse Parish School Bd., 20-21
Perez v. Commission on Professional Competence, 39

Perez v. Laredo College, 299-300
Perkiomen Valley Educ. Ass'n v. Perkiomen Valley School Dist., 104-05
Perna v. Conejo Valley Unified School Dist., 186-87
Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 56
Peters Twp. School Auth. v. United States Fidelity and Guaranty Co., 253
Peters v. Board of Educ. of Rantoul Twp., 45
Peters v. Lieuallen, 286-87
Peterson v. Multnomah Cty. School Dist. No. 1, 194
Peterson v. San Francisco Commun. College Dist., 273
Petrie v. Forest Hills School Dist., 36
Petrovich v. New Canaan Bd. of Educ., 31
Pfeiffer v. Board of Regents of Univ., 297
Phillips v. Giddings, 10
Phipps v. New Hanover Cty. Bd. of Educ., 126
Phipps v. School Dist. of Kansas City, 86-87 103
Piazza v. Ambach, 38
Pickering v. Board of Educ., 25
Pinsker v. Joint Dist. No. 28J, 28
Pires v. Pennsylvania Dep't of Educ., 124
Pittsburg Unified School Dist. v. Commission on Professional Competence, 38
Pittsburgh Elevator Co. v. West Virginia Bd. of Regents, 273
Pittston Area School Dist. v. Pittston Area Fed'n of Teachers, Local 1590, 90-91, 102
Plainedge Fed'n of Teachers v. Plainedge Union Free School Dist., 83, 95
Plainfield Ass'n of School Adm'rs v. Board of Educ, Plainfield, 80-81
Plantation Residents Ass'n v. School Bd. of Broward Cty., 6, 178
Plemmons v. City of Gastonia, 189-90
Plyer v. Doe, 136
Plymouth-Carver Reg. School Dist. v. David M. Crawley Assoc., Inc., 257-58
Popiel v. Broward Cty. School Bd., 200
Port Huron Area School Dist. v. Port Huron Educ. Ass'n, 99
Powell v. Defore, 131
Price v. Denison Indep. School Dist., 175-76
Public Improvements, Inc. v. Board of Educ., 255
Pujolas v. Town of Tonawanda, 191, 267

Quackenbush v. Johnson City School Dist., 133
Queensbury Union Free School Dist. v. Jim Walter Corp., 252
Quincy Educ. Ass'n, Inc. v. City of Quincy, 236

R.C.M. v. Texas, 153
R.J.J. v. Shineman, 167-68
Racunas v. Ringgold School Dist., 92
Rankin v. Board of Educ., Marshalltown Commun. School Dist., 102
Ranniger v. Texas, 153
Ranyard v. Board of Regents, 296
Rappold v. Board of Educ., Cleveland Hills, 42
Rauhaus v. Buckeye Local School Dist. No. 331, 46
Rawlings v. Andelo State Univ., 275, 315
Reddick & Sons of Gouverneur, Inc. v. Carthage Cent. School Dist. No. 1, 258
Regents of the Univ. of California v. Bakke, 291
Regents of the Univ. of California v. Public Employment Rels. Bd., 85-86
Regulshi v. Murphy, 191-92
Reichert v. Draud, 26-27, 59, 211
Renfroe v. Kirkpatrick, 60-61, 211
Rettig v. Kent City School Dist., 117
Reynaldo, R., *In re*, 151-52
Rhodus v. Dumiller, 209
Richland School Dist. v. Pennsylvania Labor Rels. Bd., 65, 102
Rike v. Commonwealth Secretary of Educ., 35
Ripley v. School Comm. of Norwood, 49, 98, 102, 103
Robertson v. McElrath, 60-61
Robichaux v. Terrebonne Parish School Bd., 198
Robins v. Blaney, 49
Robinson v. Joint School Dist. No. 331, 46, 93
Robinson v. New Jersey, 57
Roemhild v. Georgia, 140
Rollison v. Biggs, 132
Roman v. Appleby, 160
Roncker v. Walter, 121-22
Rone v. Daviess Cty. Bd. of Educ., 152-53
Rosenbaum v. Industrial Comm'n, 197
Ross v. Houston Indep. School Dist., 176
Rossi v. Board of Educ. of City School Dist., 46
Roth v. School Dist. of Scottsbluff, 49
Rowe v. Henry Cty. School Bd., 119
Ruff v. School Bd. of Collier Cty., 8
Rush v. Jacksonville State Univ., 270
Russell v. Delmont College, 290
Rutan v. Pasco Cty. School Bd., 34
Rutz v. Essex Junction Prudential Comm., 163

Sac City Bd. of Educ. v. Schermerhorn, 112
Sacchini v. Dickinson State College, 297
Saint Cloud Newspapers, Inc. v. District 742 Commun. Schools, 8
Saint John Vianney School v. Board of Educ. of School Dist. of Janesville, 17, 143-44
Salem v. Tattnal Cty., 232
Saltz v. Board of Educ., City of New York, 92-93
San Antonio School Dist. v. Rodriguez, 218
San Jose Teachers Ass'n v. Allen, 41
San Mateo City School Dist. v. Public Employment Rels. Bd., 79, 82
Sander v. Ajir, 313
Sanders v. Marquette Pub. Schools, 132, 207
Santee v. Orleans Parish School Bd., 265
Sapphire v. Board of Educ., 50
Sawyer, *In re*, 139
Saydel Educ. Ass'n v. Public Employment Rels. Bd., 80
Schaub v. Chamberlain Bd. of Educ., 39
Schoenfeld v. Boad of Coop. Educ. Servs., 45
School Bd. v. Burley, 244
School Comm. of Brookline v. Bureau of Sp. Educ. Appeals, 123
School Comm. of East Brookfield v. Labor Rels. Comm'n, 67
School Comm. of Grafton v. Grafton Teachers' Ass'n, 98, 102, 103
School Comm. of New Bedford v. Labor Rels. Comm'n, 103
School Comm. of Newton v. Labor Rels. Comm'n, 70, 73, 74-75, 80, 94-95
School Dist. No. 115, Clackamas Cty. v. Oregon School Employees' Ass'n, Chapter 66, 85, 111
School Dist. No. 39 v. Farber, 246-47
School Dist. of City of East Grand Rapids v. Kent Cty. Tax Allocation Bd., 233
School Dist. of Lancaster v. Commonwealth Dep't of Educ., 223
School Dist. of Pittsburgh v. Pennsylvania Dep't of Educ., 143
Schussel v. Weinberger, 92
Schweiss v. Ambach, 3
Scott v. Farrar, 187
Screws v. United States, 209
Seneca Falls Cent. School Dist., *In re*, 82-83
Seward Chapel, Inc. v. City of Seward, 249
Shaffer v. Board of School Dirs., 138
Shanker v. Isenberg, 110
Shapiro v. Regional Bd. of School Trustees of Cook Cty., 14-15, 248
Shapiro v. Thompson, 135
Sharpe v. Quality Educ., 193
Sharpley v. Hall Cty. Bd. of Educ., 38-39
Shenandoah Educ. Ass'n v. Board of Educ., Shenandoah Commun. School Dist., 74, 80, 84, 91-92
Sherbert v. Verner, 147
Shipley School, *In re*, 264
Shipley v. Salem School Dist., 32
Silverman v. Commonwealth Dep't of Educ., 29
Singleton v. Jackson Mun. Sep. School Dist., 20
Ski-Lan Gymnastics v. City of Rutland, 282
Slaughter v. East Baton Rouge Parish School Bd., 34
Slaven v. Syracuse Univ., 275
Slocom v. Littlefield Pub. Schools, 50
Smiley v. Grand Blanc Bd. of Educ., 52
Smith Cty. Educ. Ass'n v. Anderson, 72, 75
Smith v. Alabama State Tenure Comm'n, 52
Smith v. Ambach, 52-53
Smith v. Board of Educ. of East Ramapo, 44
Smith v. Board of Educ. of Mediapolis, 41
Smith v. Board of Educ. of Urbana, 51
Smith v. Broken Arrow Pub. Schools, 191, 267
Smith v. Commonwealth *ex rel.* Southwest Butler Cty. School Dist., 234
Smith v. Cumberland School Comm., 130, 207
Smith v. Fort Madison Commun. School Dist., 47
Smith v. Harris, 26
Smith v. Horace Mann Ins. Co., 197
Smith v. Kent State Univ., 299
Smith v. School Dist. No. 45, 48
Smith v. University of Arizona, 297
Smith v. Wade, 206
Smith v. Winter, 11
Smrcka v. Ambach, 120, 207
Snyder v. Charlotte Pub. School Dist., 137
Sobel v. Yeshiva Univ., 284, 289
Somonetti v. School Dist. of Philadelphia, 183
Sonstelie v. Board of Trustees School Dist., No. 10, 7-8
Sorlie v. School Dist. No. 2, 45-46
Souderton Area School Dist., *In re*, 283
South Bend Commun. School Corp. v. National Educ. Ass'n, South Bend, 77, 88, 102
Special School Dist. of Fort Smith v. Sebastian Cty., 238
Speck v. North Carolina Dairy Found., 317
Spell v. Bible Baptist Church, Inc., 144

Springfield School Dist. v. Pennsylvania Dep't of Educ., 143
Stacey G. v. Pasadena Indep. School Dist., 119
Stafford v. Valley Commun. School Dist., 49
Stamford Bd. of Educ. v. Stamford Educ. Ass'n, 77-78, 82
Stanley v. McGrath, 310
Starns v. Malkerson, 305
State Bd. of Equalization, *In re*, 262
State *ex rel.* Board of Educ., Cty. of Wood v. Truby, 88
State *ex rel.* Board of Educ., Cty. of Wyoming v. State Superintendent of Schools, 88
State *ex rel.* Board of Educ., Kanawha Cty. v. Truby, 88
State *ex rel.* Cutler v. Pike Cty. Joint Area Voc. School, 43
State *ex rel.* Douglas v. Bigelow, 139-40
State *ex rel.* Fort Zumwalt School Dist. v. Dickherber, 238
State *ex rel.* Graham v. Northshore School Dist. No. 417, 81, 88, 105
State *ex rel.* Hughes v. Board of Educ., 143
State *ex rel.* Mercurio v. Board of Regents, 313
State *ex rel.* Moon v. State Bd. of Examiners, 223-24
State *ex rel.* School Dist. of City of Independence v. Jones, 222
State *ex rel.* School Dist. of Springfield v. Wickliffe, 238
State v. Bering Strait Reg. Educ. Attendance Area School Dist., 246
State v. Engerud, 150-51
State v. Hoover, 201
State v. New York State Pub. Employment Rels. Bd., 102
Stauffer Constr. Co. v. Board of Educ., 257
Stein v. Philadelphia Fed'n of Teachers, Local 3, AFT, AFL-CIO, 105
Stempien v. Civil Serv. Employees' Ass'n, 71
Stemple v. Board of Educ., Prince George's Cty., 118
Stern v. Sholdice, 294-95
Stevens v. Tillman, 21, 203
Stevenson v. Spencerport Cent. School Dist., 36-37
Stewart v. Salem School Dist., 127
Stigge v. Graves, 4, 247
Stiles v. Ernest, 11-12
Stoller v. College of Medicine, 312
Stone v. Traynham, 239
Strand v. Petersburg Pub. Schools, 21-22
Strathie v. Department of Transp., 24
Struthers City School Bd. of Educ. v. Struthers Educ. Ass'n, 96
Supan v. Michelfeld, 30
Sutton v. Mariana School Dist., 43, 97
Sweeney v. Research Found. of State Univ. of New York, 285
Swingle v. State Employees' Appeals Comm'n, 37-38
Swital v. Board of Educ., Bay Shore Union Free School Dist., 109
Syracuse Univ. v. City of Syracuse, 273
Szabo v. Board of Educ., 37

T.L.O., *In re*, 150-51
Tanner v. Hazlehurst Mun. Sep. School Dist., 27, 59
Tarter v. Raybuck, 150, 209
Tasby v. Estes, 176
Tasby v. Wright, 20, 176
Tate v. Westerville City Bd. of Educ., 30-31
Tatro v. Texas, 126
Taylor v. Berberian, 50
Taylor v. Board of Trustees, Del Norte Unified School Dist., 44, 49
Teaneck Bd. of Educ. v. Teaneck Teachers' Ass'n, 74, 80-81, 83, 95
Teplitz v. Mount Prospect Elem. School Dist., 134
Thermo Products Co. v. Chilton Indep. School Dist., 5, 245
Thomas M. Durkin & Sons, Inc. v. Nether Providence Twp. School Auth., 256
Thomas v. Board of Educ., 47
Thomas v. Farmer, 27, 59
Thompson v. Board of Educ., 34
Tiemann v. Independent School Dist. No. 740, 184
Tiernan v. Trustees of California State Univ., 298
Tilton v. Jefferson Cty. Bd. of Educ., 119-20
Timms v. Metropolitan School Dist. of Wabash Cty., 131
Tipton v. Bossier Parish School Bd., 267
Tolliver v. Yeargan, 300-01
Totten v. Board of Educ. of Mingo Cty., 34
Town of Burlington v. Board of Educ., 223, 251
Town v. Burlington v. Department of Educ., 120
Tracy v. Otsego Bd. of Educ., 96
Trustees of Union College v. Board of Assessment Rev., 272
Tucker v. Board of Educ., Town of Lexington, 99
Turiello v. City of Revere, 253
Tyska v. Board of Educ. of Twp. High School Dist. 214, 4-5, 258-59

Unified School Dist. 251 v. Secretary, Kansas Dep't of Human Resources, 93
Unified School Dist. No. 407 v. Fisk, 12
Union City School Dist. v. Commonwealth Unemployment Compensation Bd., 108
United Faculty, Local 1847 v. Board of Regents, State Univ. Sys., 62
United Pacific/Reliance Ins. Co. v. Horace Mann Ins. Co., 196
United States v. Board of Educ. of the City of Chicago, 168
United States v. CRUCIAL, 175, 260-61
United States v. Griffin, 306-07
United States v. Tilleraas, 306
United Steelworkers of America, AFL-CIO v. Weber, 291
United Teachers, Los Angeles v. Board of Educ., City of Los Angeles, 23
University of Alaska v. Geistauts, 297
University of Hawaii Professional Assembly v. University of Hawaii, 102, 301-02
University of Hawaii Professional Assembly, Daeufer v. University of Hawaii, 62, 105, 302
University of Hawaii v. University of Hawaii Professional Assembly, Watanabe, 105, 302
University of Hawaii v. University of Hawaii Professional Assembly, Widerholt, 105, 302

Vail v. Board of Educ. of Paris Union, 29
Valdez v. Grover, 141, 207
Valley v. Rapides Parish School Bd., 260, 173-74
Vandriest v. Midlem, 200
Vanlaarhoven v. Newman, 305
Vann v. Board of Educ., 192, 267-68
Vantage Petroleum v. Board of Assessment Rev., 239, 262-63
Vaughn v. Reed, 160
Vaughns v. Board of Educ., 261
Verniero v. Air Force Academy School Dist. No. 20, 22
Vestal Teachers' Ass'n v. Newman, 94
Voorhis v. Warwick Valley Cent. School Dist., 52

Walker Cty. Bd. of Educ. v. Walker Cty. Educ. Ass'n, 61-62, 83
Walker v. Board of Assessors of Nassua Cty., 230, 263
Wallace v. Florida A & M Univ., 311
Walsh v. Louisiana High School Athletic Ass'n, 145
Washburn Pub. School Dist. No. 4 v. State Bd. of Pub. School Educ., 247
Washington Univ. Med. Cent. Redevelopment Corp. v. See, 269
Washington Univ. v. Leachman, 276
Washington v. McKinnon, 152
Washington v. Salisbury, 6, 136-37
Waterbury Constr. Co. v. Board of Educ., 256
Waterloo Commun. School Dist., *In re*, 42-43
We Transportation, Inc. v. Board of Educ. of Uniondale, 16-17
Webster v. Board of Trustees, 33
Weeks v. Northeast Oklahoma Area Voc.-Tech. School, 43
Weiss v. Collinsville Commun. Unit School Dist. No. 10, 266
Weissman v. Mogol, 202
Weissman v. State, 274-75
Welch v. Board of Educ. of Chandler, 36
Wells v. Doland, 295-96
Wellsboro Area School Dist., *In re*, 95
Weltz v. Board of Educ. of Scotland, 50
Wendland v. Washburn Univ., 276
West Alleghany Hosp. v. Board of Property Assessors, 230-31
West Hartford Bd. of Educ. v. State Bd. of Labor Rels., 73, 75
West Ottawa Educ. Ass'n v. West Ottawa Bd. of Educ., 80-81, 93
West Shore Educ. Ass'n v. West Shore School Dist., 87, 92
Western Line Consol. School Dist. v. Greenville Mun. Sep. School Dist., 12, 246
Wetsel v. Independent School Dist. I-1, 184-85
Wheatley v. Board of Educ., 41
White v. South Park Indep. School Dist., 211
Whitewater Educ. Ass'n v. Whitewater Unified School Dist., 85, 90
Whittington v. Sowela Tech. Inst., 315
Widmar v. Vincent, 157
Wiley House v. Scanlon, 129
Willamina School Dist. 30J v. Willamina Educ. Ass'n, 105
William S. v. Gill, 132
Williams v. Spencer, 162
Wilson v. Armstrong Cty. School Dist., 282
Wilson v. Collinsville Commun. Unit School Dist., 163
Wilson v. Illinois Benedictine College, 313
Wilson v. School Bd. of Marion Cty., 232
Winchell v. United States, 277
Winslett v. Independent School Dist. No. 16, 36
Wisconsin v. Popanz, 140

Wisconsin v. White, 140
Wolman v. Walter, 159, 215
Wood v. Independent School Dist. No. 141, 33
Wood v. Strickland, 163, 206
Woodruff v. Georgia S. Univ., 312
Wordsworth Academy v. Gaugler, 121
Wrenn v. Kansas, 293
Wright v. County of Macon, 249
Yaris v. Special School Dist. of St. Louis Cty., 126
Yielding v. Crockett Indep. School Dist., 26
Yoder v. Wisconsin, 139
Yselta Fed'n of Teachres v. Tselta Indep. School Dist., 56

Zike v. State Personnel Bd., 48
Zvi D. v. Ambach, 118-19, 224-25

INDEX

- Age discrimination, 23
- Age Discrimination in Employment Act, 23, 280, 291-292
- Antitrust, 317-318
- Arbitration
  - building design and construction, 256-258
  - determination, 84-88
  - grievability, 83-100 (*see also* Grievances)
  - judicial review, 100-105
  - management prerogatives, 93-97
  - presumption, 83-84
  - procedural issues, 89-93
    - timeliness, 90
    - waiver, 91-92
  - remedy, 88-89
  - tenure issues, 97-98
- Assault and battery, 200-201
- Athletics, 316
- Attorneys
  - Civil Rights Attorney's Fees Award Act, 130-134
  - fees, 130-134, 160, 173
  - handicapped children, 130-134
- Authority to bargain, 61-63

- Bargaining
  - agreements, 82-83
  - arbitrability, 83-100, 105-107
  - authority to bargain, 61-63
  - collective bargaining, 301-302
  - concerted activity, 107-110
  - constitutional issues, 55-56
  - duty to bargain, 72-74
  - elections, 64-65
  - exclusive representation, 65-72
  - factfinding, 105-106
  - fair share agreements, 56-59
  - grievances, 83-100
  - impasse and dispute resolution, 105-107
  - interrelationship with other laws, 74-78
  - public employee relations boards (PERB), 58, 64-65, 73, 79, 85, 107-109
  - representation problems, 63-65
  - scope of, 72-83
  - strikes, 107-108
  - unions, 63-65
  - unit determination, 63-64
- Bilingual-bicultural programs, 141-142
- Board of education
  - authority of, 2-6
  - authority to provide instruction, 6
  - bus contracts, 15-16
  - conflicts of interest, 9-10
  - disqualification of candidates, 12
  - district organization, 13-15
  - election contests, 10
  - general powers, 4-6
  - method of selection, 11-12
  - open meeting laws, 7-9, 12
  - power to contract, 6-7
  - recall of board members, 11
  - school closures, 4-5
  - state boards, 2-4
  - transfer of property, 13-15
  - transportation of students, 15-17
  - voting irregularities, 10
- Building design and construction, 251-258 270-272

- Certification, 52-53
- Civil Rights Act of 1964 (Title VI), 281-282
- Civil Rights Act of 1964 (Title VII), 20-22
- Civil Rights Attorney's Fee Award Act, 130-134
- Collective bargaining. *See* Bargaining
- Competency tests, 165-167
- Compulsory attendance, 138-141
- Conflicts of interest, 9-10
- Constitutional rights and issues
  - first amendment, 24-28, 56-58, 60-61, 153-162
  - fourth amendment, 149-150, 153
  - freedom of expression, 161-162
  - freedom of religion, 27-28
  - freedom of speech, 25-27
  - search and seizure, 149-153
- Constitutional torts
  - employee-initiated cases, 209-211
  - section 1983, 206-210
- Contractual disputes
  - administrative regulations, 47-49
  - board policies, 46-47
  - contractual provisions, 46-47
  - state statutory provisions, 47-49

- Defamation, 201-203
- Desegregation
  - cross-district remedies, 169-171
  - de jure segregation, 172-173
  - federal cases, 173-177
  - higher education, 282
  - magnet schools, 158
  - school closures, 259-261
  - segregative intent, 167-168, 174
  - state courts, 177-178
  - *Swann* and *Keyes*, 172-173
  - systemwide remedies, 167-169

Discipline, 33-41
Discrimination
  age, 23
  "disparate impact" theory, 286
  "disparate treatment" theory, 285-286
  employment, 19-24, 281-294
  Equal Pay Act, 289-291
  handicapped, 23-24
  hiring process, 293-294
  maternity leave, 23
  multiple regression analysis, 283-285, 289
  national origin, 295
  quota system, 19-20
  racial, 19-21, 281, 287
  school sports, 147-149
  sex, 20-23, 147-149, 284-285
  Title VI, 281-282
  Title VII, 20-22, 282-288
  Title IX, 288-289
Dismissal, 33-41, 310-313
Due process, 28-33, 208, 305, 312-313

Education for All Handicapped Children Act of 1975 (EHCA), 115-119, 121-123, 124-134, 165-166
Elections
  contests, 10
  disqualification of candidates, 12
  method of selection, 11-12
  recall, 11
  voting irregularities, 10
Employees
  administrative regulations, 47-49
  breach of contract, 296-297
  certification, 52-53
  collective bargaining (*see* Bargaining)
  contractual disputes, 46-49
  contractual provisions, 46-47
  denial of employee privileges, 299-300
  discipline, 33-41
  discrimination (*see* Discrimination)
  dismissal, 33-41
  due process, 28-33
  first amendment rights, 24-28
  freedom of religion, 27-28
  freedom of speech, 25-27
  hearing, 32-33
  higher education (*see* Higher education, *at* employees)
  immorality, 35-38
  incompetency, 38-41
  injuries and workers' compensation, 197-200
  insubordination, 33-35
  liberty interest, 29-30
  negligence, 38-41
  nontenured, 294-298 (*see also* Higher education, *at* nontenured faculty)
  notice, 30-32
  probationary period, 49
  procedural, 28-33
  property right, 28-29
  quota system, 19-20
  reduction in force, 41-46
  sexual harassment, 35
  substantive rights, 24-28
  tenure, 49-52, 97-98, 296-298
  tenure by default, 50-51
  tenured faculty, 298-303 (*see also* Higher education, *at* tenured faculty)
  unprofessional conduct, 35-38
Equal Employment Opportunity Commission (EEOC), 283
Equal Pay Act, 289-291
Equal protection, 305-306
Expulsion, 144, 163-165, 184

Fair Labor Standards Act, 290
Fair share agrements, 56-59
Finance
  driver education, 228-229
  equal protection, 217-221
  extra-curricular activities fees, 228
  federal funds, 225-227
  public funds for private schools, 212-216
  residence requirements, 227
  school fees, 227-229
  school tax issues, 229-241
    power to tax, 229-235
    school districts, 235-240
    uses of revenue, 240-241
  sources and allocations of public school funds, 217-229
  special education, 224-225
  state aid, 221-223
  state school finance program, 217-224
Financial aid, 306-307
Financial exigencies, 300-301
First amendment
  Bible study groups, 157-158, 160-161
  freedom of association, 308-309
  freedom of expression, 161-162
  freedom of speech, 294-295, 307-308
  freedom of the press, 310
  open access policy, 158
  religious rights, 153-161
  school prayer, 153-156
  students, 307-310
  tuition tax credits, 156
Fourteenth amendment, 165-166, 208, 217-218, 303-306, 314
Fourth amendment, 149-150, 153
Freedom of association, 308-309
Freedom of expression, 161-162
Freedom of religion, 27-28
Freedom of speech, 25-27, 294-295, 307-308
Freedom of the press, 310

Governance, 1-17
Grievances, 83-100, *See also* Arbitration

Handicapped, 314
Handicapped children (students)
  attorney fees and damages, 130-134
  competency tests, 165-166
  discipline, 129
  Education for All Handicapped Children Act of 1975 (EHCA), 115-119, 121-123, 124-134, 165-166
  individualized educational plan (IEP), 116-117, 119-122, 124-126
  notice, 166
  Rehabilitation Act of 1973, 130, 165-166
  right to education, 124-129
  section 504, 126, 128, 130-134
  tuition and assignment, 116-124
Handicapped employees, 23-24
Hearing, 32-33
Higher education
  antitrust, 317-318
  employees, 281-303
    Age Discrimination in Employment Act, 291-292
    Equal Pay Act, 289-291
    hiring discrimination, 293-294
    nontenured faculty, 294-298
    Rehabilitation Act of 1973, 292
    sexual harassment, 294
    Title VI, 281-282
    Title VII, 282-288
    Title IX, 288-289
  intergovernmental relations, 279-281
  liability, 315-317
    contract, 317
    personal injury, 315-316
    workers' compensation, 316
  nontenured faculty, 294-298
    breach of contract, 296-297
    first amendment freedom of speech, 294-295
    nonrenewal procedures, 295-297
    part-time faculty, 298
  property, 268-277
  students, 303-314
    admission, 304
    dismissal, 310-313
    federal regulations, 314
    financial aid, 306-307
    first amendment issues, 307-310
    handicapped, 314
    nonresident tuition, 304-306
  tenured faculty, 298-303
    administration and staff, 302-303
    collective bargaining, 301-302
    employee privileges, denial of, 299-300
    financial exigencies, 300-301
    termination for cause, 298-299

Immunity
  governmental, 188-189
  sovereign, 188-189
  statutory, 189-192
Incompetency, 38-41
Insubordination, 33-35
Insurance, liability, 196-197

Lemon test, 154-156, 158-159
Liability, institutional, 273-276, 315-317, *See also* Higher education, *at* liability
Liberty interest, 29-30, 295-297

Magnet schools, 168
Maternity leave, 23
Multiple regression analysis, 283-285, 289

National College Athletic Association (NCAA), 314, 317-318
Negligence
  comparative, 194-195
  contributory, 192-194
  defenses, 188-195
  elements of, 180-181
  employees, 38-41
  en route to school, 186-187
  governmental immunity, 188-189
  immunity, 188-192
  liability insurance, 196-197
  nonstudent injuries, 188
  notice of claim, 194
  personal injury, 264-268, 273-276
  school buildings and grounds, 187
  statute of limitations, 194
  statutory immunity, 189-192
  student injuries, 182-187, 316
Nontenured faculty, *See* Higher education, *at* nontenured faculty
Notice, 8-9, 30-32
Notice of claim, 194
Nuisance, 277

Open access policy, 158
Open meeting laws
  meetings, 7-8
  notice, 8-9
  taping board meetings, 9

Personal injury liability, 273-276, 315-316
Placement, 116-124
Prayer in schools, 153-156
Private and parochial schools
  expulsion, 144
  first amendment, 214
  income tax deduction, 212-214
  Lemon test, 142-143
  public funds, 212-216

  textbook loans, 214-215
  textbook-sharing, 144
  transportation, 142-144, 215-216
Procedural due process, 28-33, *See also*, Due process
Property
  attachment of land, 246-248
  bond issues, 248-249
  building design and construction, 251-258
    arbitration, 256-258
    competitive bids, 251
    construction funding, 251
    contractor claims, 255-256
    design and performance, 253-256
    prevailing wages, 251
    roofs, 252
  desegregation, 259-261
  detachment of land, 246-248
  development, 249-251
  higher education, 268-277
    bankruptcy, 276-277
    board, general authority of, 269
    building design and construction, 270-272
    development, 269-270
    estates, 276
    income taxes, 277
    nuisance, 277
    personal injury, 273-276
    property taxes, 272-273
    zoning, 269-270
  landlord/tenant, 268
  personal injury, 264-268
    negligence, 265-268
    workers' compensation, 265
  right, 28-29
  school board's authority over, 243-245
  school closures, 258-261
  taxes, 261-264
  tax exemptions, 262-264
  trespass, 268
  zoning, 249-251
Property interest, 28-29, 295-297, 303
Public Employee Relations Board (PERB), 58, 64-65, 73, 79, 85, 107-109
Public Employee Relations Commission, 62, 64, 72, 78, 86, 88
Pupils
  attorney's fees, 130-134
  bilingual-bicultural programs, 141-142
  competency tests, 165-167
  compulsory attendance, 138-141
  desegregation, 167-178
  Education for All Handicapped Children Act of 1975 (EHCA), 115-134, 165-166
  expulsions, 144, 163-165, 184
  handicapped, 115-134, 165-166
  private and parochial schools, 142-144
  right to education, 124-129
  school sports, 145-149
  search and seizure, 149-153
  sexual harassment, 35
  substantive rights, 149-162
  suspensions, 163-165
  testing and placement, 165-167
  transportation, 138
  tuition and assignment, 116-124, 134-137
  tuition tax credits, 156

Racial discrimination, 19-21, 281, 287
Reduction in force (RIF)
  elimination of position, 42-43
  necessity, 41
  selection of employee, 43
  seniority and reassignment, 44-46
Rehabilitation Act of 1973, 130, 165-166, 292, 314
Religious rights
  Bible study group, 157-158, 160-161
  first amendment, 153-161
  open access policy, 158
  school prayer, 153-156

School boards, *See* Board of education
School closures, 4-5, 258-261, *See also* Property, *at* school closures
School district organization, 13-15
School prayer, 153-156
School sports
  sex discrimination, 147-149
  state athletic and activity associations, 145-147
  transfer rule, 145-146
Search and seizure
  fourth amendment, 149-150, 153
  sniff dog search, 149
  strip search, 152-153
Section 504, 126, 128, 130-134, 314
Section 1983, 206-210
Sex discrimination, 20-23, 147-149, 284-285
Sexual harassment, 294
Special education, 224-225
Statute of limitations, 194
Strikes, 107-108
Students, *See also* Pupils
  admission, 304
  dismissal, 310-313
    academic, 312-313
    disciplinary, 310-311
  federal regulations, 314
    NCAA regulations, 314
    Rehabilitation Act of 1973, 314
  financial aid, 306-307
    student aid grants, 307

    student loan default collection, 306-307
  first amendment issues, 307-310
    freedom of association, 308-309
    freedom of press, 310
    freedom of speech, 307-308
  handicapped, 115-134, 314 (*see also* Handicapped children (students))
  higher education, 303-314 (*see also* Higher education, *at* students)
  injuries, 182-187
  nonresident tuition, 304-306
Substantive rights, 24-28, 149-162, *See also* Constitutional rights and issues
Suspensions and expulsions
  drugs, 162
  notice, 163
  property rights, 184
  weapons, 184

Tax issues, 156, 229-241, 261-264, 272-273, *See also* Finance
Teachers, *See* Employees
Tenure, 49, 50-52, 66-67, 97-98, 282-283, 296-298, *See also* Higher education, *at* tenured faculty
  probationary period, 49
  tenure by default, 50-51
  tenure status, 51-52
Testing and placement, 165-167
Title VI, 281-282
Title VII, 282-288
Title IX, 288-289, 309
Torts
  assault and battery, 200-201
  comparative negligence, 194-195
  constitutional torts, 206-211
  contributory negligence, 192-194
  defamation, 201-203
  defenses, 188-195
  employee injuries/workers' compensation, 197-200
  en route to and from school, 186-187
  immunity, 188-192
  interference with contract, 203-204
  invasion of privacy, 205-206
  liability insurance, 196-197
  negligence, 180-188
  nonstudent injuries, 188
  notice of claim, 194
  products liability, 204
  school building and grounds, 187
  school hours, 182-186
  statute of limitations, 194
  student injuries, 182-187
Transportation
  bids, 16-17
  bus contracts, 15-16
  duty to provide, 17, 138
  private and parochial schools, 142-144, 215-216
Trespass, 268
Tuition
  assignment, 134-137
  nonresident, 304-306
  tax credits, 156

Unions, *See* Bargaining
Unprofessional conduct, 35-38

Workers' Compensation, 197-200, 265, 316

Zoning, 249-251, 269-270

ABOUT THE EDITOR

Philip K. Piele received his Ph.D. from the University of Oregon where he is now professor of educational policy and management, director of the ERIC Clearinghouse on Educational Management, executive secretary of the Oregon School Study Council, and director of networks and communications for the Center for Advanced Technology in Education. He has served as editor of the *Yearbook* since 1975 and contributed chapters on property from 1972 to 1983. He has also written numerous monographs, papers, and journal articles on a variety of school law topics. His most recent work, an article (coauthored with Stephen Pitt) entitled "The Use of School Facilities by Student Groups For Religious Activities," was published in 1984. Professor Piele serves on the editorial boards of several professional journals and is past-president of NOLPE.